



K

578

T27

1875

**Cornell University Library**

THE GIFT OF

Prof. J. P. Church

A. 50116

7/8/93

Cornell University Library  
K 578.T27 1875

Essays on law reform, commercial policy,

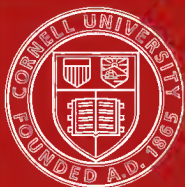


3 1924 017 203 245

law



**Cornell Law School Library**



Cornell University  
Library

The original of this book is in  
the Cornell University Library.

There are no known copyright restrictions in  
the United States on the use of the text.

# ESSAYS

ON

LAW REFORM, COMMERCIAL POLICY,  
BANKS, PENITENTIARIES, ETC.

IN

GREAT BRITAIN

AND THE

UNITED STATES OF AMERICA.

BY

**J. L. TELLKAMPF, LL.D. P.D.**

Member of the German "Reichstag" and of the House of Peers of Prussia, Professor  
of Political Science in the University at Breslau.

SECOND EDITION.

BERLIN 1875.

PUTTKAMMER & MÜHLBRECHT

LAW-BOOKSELLERS.

DEC 8 '70



# ESSAYS

ON

LAW REFORM, COMMERCIAL POLICY, ETC.





# ESSAYS

ON

LAW REFORM, COMMERCIAL POLICY,  
BANKS, PENITENTIARIES, ETC.

IN

GREAT BRITAIN

AND THE

UNITED STATES OF AMERICA.

BY

**J. L. TELLKAMPF, L.L.D. P.D.**

Member of the German "Reichstag" and of the House of Peers of Prussia, Professor  
of Political Science in the University at Breslau.

SECOND EDITION.

BERLIN 1875.

PUTTKAMMER & MÜHLBRECHT

&  
LAW-BOOKSELLERS.

A.50116

6031 C28

PRINTED BY W. DRUGULIN, LEIPZIG.

TO  
THEIR ROYAL HIGHNESSES,  
THE PRINCE AND PRINCESS  
*Frederick William of Prussia,*

THIS WORK IS BY PERMISSION DEDICATED

*By their most humble and devoted Servant*

*The Author.*



## YOUR ROYAL HIGHNESSES!

BE pleased graciously to accept this work, which through your condescension I am permitted to inscribe to Your Royal Highnesses, as an expression of my sincere homage. I can but cherish the humble hope that its contents—the result, in great measure, of personal observation and investigation in England and the United States of America—may during some leisure hour engage the attention of a princely young couple whose enlightened views and eminent virtues are subjects of universal admiration equally to the loyal people of Great Britain and Prussia.

The lively enthusiasm, which your union kindled in the hearts of both nations—making your progress from London to Berlin a triumphal procession, new

proofs of affection and respect meeting You at every step—shows clearly how deep and universal is the sympathy felt in this alliance of the Royal Houses of Britain and Prussia, as affording the strongest and most fortunate promise for the legal security of all men of whatever class, for the progressive development of social happiness, and for the advancement of those enlightened views of policy, public and private, which under the wise and gracious sway of Her Majesty, Queen Victoria, bear such glorious fruits in the constitutional life of Great Britain, and which under the just and disinterested government of His Royal Highness, the Prince Regent, so happily are carried out in Prussia, firmly based upon the consti-

tution and the laws. The religious regard for, and the conscientious performance of, their engagements and duties towards the people over whom they rule on the part of the Royal Parents—this it is which, calling forth the deepest gratitude of all hearts, has awakened such extraordinary enthusiasm for Your Royal Highnesses, their children—a common feeling acting as a new tie of sympathy and friendship between two nations, whose origin, religion and civilization are in many respects so similar.

Hence, too, the deep, sincere, and universal joy in both kingdoms at the birth of the young prince Your son. Hence the heartfelt prayers to the Universal Father to protect and bless him, to render him brave,

just, good, worthy of his distinguished parents and ancestors, one whose character shall be a guarantee that the public blessings we enjoy shall be transmitted unimpaired to our posterity.

The interest felt by Your Royal Highnesses in science, art, and literature, is a subject of joy and pride to all Germans devoted to either; and they fondly hope and trust that in future ages no princely or royal names will shine brighter upon the roll of those who have laboured for their promotion, than Yours.

Two princesses of the Royal House of England have already left names, glorious for their encouragement of sound learning and art in Germany—the



Electress Sophia of Hannover, the celebrated mother of George I., and her highly cultivated daughter Sophia Charlotte, Queen of Prussia, the magnanimous patroness of Leibnitz and of the Royal Academy of Berlin. Their generous patronage of the arts and sciences have contributed most essentially to their development and progress in Germany.

May the life which so brightly and hopefully opens before Your Highnesses, be one of serene, unclouded happiness—happiness in each other—happiness in the sincere affection and homage of the intelligent people of Prussia,—happiness in the well-deserved good will and admiration of other nations—happiness, when full of years and honours, in the conviction that

You have added lustre to the high places to which  
You were born, to the great names of Your ancestors!  
Such is the sincere, the ardent wish and hope of

YOUR ROYAL HIGHNESSES'

BERLIN.  
*January 1859.*

Most humble and devoted

J. L. Tellkampff.

# CONTENTS.

## I.

### ON CODIFICATION OR THE SYSTEMATIZING OF LAW.

	Page
Introduction . . . . .	3
Of the nature of Law in general . . . . .	6
Nature of Common Law . . . . .	17
The present state of English and American Municipal Law . . . . .	26
Objections against Codification answered . . . . .	39
Character of a Code . . . . .	45
Committees for framing Codes proposed . . . . .	51
Method of Compilation . . . . .	60
Necessity of making these Committees permanent . . . . .	63
On a general Code for the United States of America . . . . .	79
General historical remarks . . . . .	80
The Roman Code . . . . .	83
The Prussian Code . . . . .	87
The Austrian Code . . . . .	89
The French Code . . . . .	90
Conclusion . . . . .	92

## II.

### COMMERCIAL POLICY.

The German Zollverein . . . . .	97
Commercial Treaties based on Free Trade Principles, with reference to the commerce between the United States, England and the German Zollverein . . . . .	112
Atlantic Ocean Steamers, and reform of the Passenger Acts . . . . .	123

## III.

## MONEY AND BANKS.

	Page
Money and Banks . . . . .	137
Plan for regulating the issue of notes, with reference to Sir Robert Peel's Bank Act of 1844, and its suspension in 1857	156

## IV.

## REFORM OF PUNISHMENTS AND PRISONS.

Punishment by Separate Imprisonment in England, the United States of America and France. Report of a journey made by order of His Majesty the King of Prussia . . . . .	187
Introduction . . . . .	187
I. Prisons appertaining to the Separate System . . . . .	189
II. Prisons appertaining to the Silent or Auburn System . . . . .	189
I. What is the relative severity of Separate Confinement compared with other modes of imprisonment . . . . .	191
A. Opinions of the English in regard to this question . . . . .	191
B. Results hitherto attained in England from the System of Separate Confinement for a period of from one and a half to two years . . . . .	195
C. The more recent mode of inflicting punishment by Separate Imprisonment in England . . . . .	198
D. Is Separate Confinement equal in its operation? . . . . .	202
II. To what duration (on medical grounds) should Separate Confinement be limited . . . . .	207
A. Medical opinion of Sir Benjamin Brodie and Dr. Ferguson respecting the duration of Separate Imprisonment . . . . .	209
B. Opinion of the Surveyor General of the English prisons, Colonel Jebb, respecting the limits of the duration of Separate Imprisonment . . . . .	211
C. Extract from a letter addressed to Earl Grey, containing the views of Sir George Grey, Secretary of State for the Home Department, on the period of Separate Confinement, to be enforced under his authority, taken from papers on convict discipline, and transportation, laid before Parliament . . . . .	216

# CONTENTS.

XV  
Page

D. Report on the state of mind of the prisoners in the general prison at Perth, in Scotland, by Dr. Abercrombie, and Dr. Christison . . . . .	217
E. Report of the superintending Committee of Milbank, touching the duration and the modifications of Separate Imprisonment . . . . .	220
F. Limitation and modification of Separate Imprisonment at Trenton in North America . . . . .	222
G. Prison fare . . . . .	225
H. Limitation of Separate Imprisonment with respect to moral improvement.—Experience acquired at Pentonville and Parkhurst in this respect . . . .	226
III. Propositions respecting the infliction of punishment by Separate Imprisonment . . . . .	238
On Prison Reform . . . . .	251
Dickens on the Philadelphia prison . . . . .	276

## V.

### GERMAN AND ENGLISH CIVILIZATION. THEIR SIMILAR DEVELOPMENT THE RESULT OF A SIMILAR ORIGIN, CHARACTER AND HISTORY.

National Character and Political Institutions . . . . .	291
Language and Literature . . . . .	301



## PREFACE TO THE SECOND EDITION.

As the following Essays were first published in London and did not come into the regular German book trade, and as they treat questions, which, just now, are of practical interest in Germany, I hope that their republication in that country will not be deemed importune. The great and important labours of the German "Reichstag" in the reform of the German Law, the legislation on Money and Banks, and the reform of Punishments of Civil and Criminal Procedure &c. &c. make me desirous of laying before the German public my little collection of Essays upon the same subjects, namely: the Systematizing of the Law, Money and Banks, Commercial Policy, and Reform of Punishments and Prisons, hoping, that they may be found to possess at least some slight interest for the German reader.

In these articles I have attempted to give the outline of the theory of the above mentioned subjects with its application to the requirements of England, the United States of America, and Germany. The great importance of these subjects, leads me to indulge the hope that those readers who may be assumed to take up an impartial point of view may regard my Essays as worthy a moment's attention. At all events, I would request the German reader to grant them at least the indulgence due to the hearty zeal and deep felt interest

in important practical subjects, which have produced these slight Essays. Although they were more especially written for the English and American public, they are also intended for German readers; for while writing my Essays on legal and politico-economical topics, my inquiries and investigations into facts obliged me to call the attention of my countrymen to the numerous points of resemblance in genius and progress between Germany, England, and North-America,—those great states of truly common Teutonic origin. This fact suggested the expediency of collecting into the present small volume, the articles which I have written and published separately during my long sojourn in England and the United States, and which I now give in their original form, as I have not the time to translate them into German.

Essays upon the topics treated in the following volume are not intended for the many, and a few words respecting the reception they have met with on their first appearance, may be necessary to call the attention of even those interested in such subjects to a new publication. It is therefore for this reason that I communicate the following flattering letters from eminent men and allude to these practical results from these papers, which encourage me to reproduce them in a second edition for Germany.

The first Essay on Codification or the Systematizing of the Law appeared in the "American Jurist" for October 1841 and January 1842, published in Boston, and, as I was assured by Mr. Townsend, then Member of the New York Assembly, had considerable effect in calling the attention of that Assembly to the necessity



as well as the obvious advantages of such a measure. I have great satisfaction in thinking, that I may perhaps, in some degree, have contributed to the furtherance of this important object.

Mr. TOWNSEND wrote me:

*Albany 2 February 1843.*

Dear Sir

I inclose you a letter Judge Spencer has been kind enough to write.

You must be gratified to observe how you have completed the conversion to codification of the most distinguished Chief Justice the common law has ever had in this State.

Faithfully Yours

ISAIAH TOWNSEND.

Prof. TELLKAMPF.

Judge SPENCER wrote:

*Albany January 31. 1843.*

I have read with great satisfaction the essay on codification, and to me it appears to be a masterly production, evincing great ingenuity and powerful reasoning. In fact I think it conclusively proves the great benefits of a codification of the laws of every enlightened nation or state.

With high respect

A. SPENCER.

The celebrated Mr. S. DU PONCEAU wrote to me from Philadelphia as follows:

March 22nd 1842:

"I remember with pleasure that the last time that I was in company with Professor Beck in this city, the  
a \*

conversation turned upon the valuable periodical works published in Boston, and amongst others the American Jurist, which I praised as it deserves; and I told the Professor that I had particularly distinguished in the two last numbers of that periodical your essays on codification, which I considered as exhibiting much learning, depth of thought and strength of reasoning, and deserving the attention of philosophical jurists, whatever opinion they might entertain on the subject of which you have treated."

The New York Assembly appointed at that time a standing committee, for the purpose of systematizing the laws of the State, consisting of Messrs David Dudley Field, A. Loomis and David Graham, and at a later period, passed a bill empowering the Commissioners to continue the systematizing of the general laws of the State. Since the year 1843 the Commissioners have prepared and edited the new Codes of Civil Procedure and Criminal Procedure, and the Political Code of the State of New York, with such signal success as to excite the attention and praise of the jurists of England. The labours of the Commissioners have secured to them a very high reputation both in America and in England. Mr. Dudley Field does me the honour of sending me regularly the different parts of the new Codes as they appear.

With regard to the second Essay on Commercial Policy, and more particularly the section entitled: "Atlantic Ocean Steamers, and reform of the Passenger Acts," Mr. C. T. Gevekoht, who in 1846 was specially sent as Chargé from Bremen to the Government of the United States at Washington, in order to promote the interests of his native State with respect to the

establishment and management of the new Atlantic Mail Steamers, gave me the following letter to the well known Burgomaster, Dr. Smidt at Bremen, concerning the same subject.

Sir!

It is with a high degree of satisfaction that I have the pleasure of introducing by these lines Professor J. L. Tellkamp to your valuable acquaintance.—The Professor has filled for several years the honourable place of a professorship at Columbia college, which he has relinquished in consequence of a call from the government at Berlin.

As you are well aware of by my previous communications, Professor Tellkamp has always taken a great interest in the commercial relations of this country with Germany, and both himself and the Prussian Ambassador, Baron of Gerolt, at Washington, have favoured me with their kind and influential assistance in promoting the establishment of a direct steamer-line between the United States and Bremen via Cowes.

I am fully convinced that your personal acquaintance with the Professor will be the source of mutual interest and satisfaction, and I hope at the same time that this meeting will assist in promoting the commercial welfare of our country.

I have, I am sure, no need to claim especially your kind and friendly attention for the Professor, but beg to assure you anew of my feeling of deep regard and esteem, remaining most respectfully Sir!

*New York* July 31. 1846.

your very obt. servt.

Burgomaster Dr. SMIDT, Bremen.

C. T. GEVEKOHT.

Baron GEROLT, the Prussian Minister at Washington, wrote me the 15th July 1846:

“Your essay in the last July number of Hunt’s Magazine (in which it first appeared) I have read with much interest, and I shall send a copy thereof to His Majesty, since I wish that the same may also hear an authority like yours on this Steamer-line between this country and Germany.”

The establishment of this Mail-Steamer-line connecting the ports of New York and Bremen introduced a cheaper postage, and broke the former monopoly of England in regard to the postage, which at that time was a dollar for each letter forwarded by the English steamers from America to Europe, and which is now reduced to a few pence or groschen.

But whatever importance a practical view of this line may possess, its value is materially increased, on considering its influence on Civilization.

Steam-power applied to navigation, has performed marvellous feats. By it the United States of America are brought into such close contact with the continent of Europe, that the statesmen and capitalists of both became better acquainted, by personal observation, with those advantages which flow from a more extended and friendly commercial intercourse and from an assimilation of their commercial policy.

Great advantages result to those nations whose ports are brought into connection by Atlantic steamers. The benefits of an increased and speedy intercourse are incalculable for the interests of industry. The administration at Washington at that time decided upon a route for the American Mail Steamer-line, which was

sure to realize the hopes of an extended commercial intercourse with the nations of Europe, without restricting such advantages to a single country; and the German States, with a true appreciation of their own interests, have cheerfully cooperated with the United States in promoting the successful establishment of that line of Mail-Steamers, in whose stead the equally excellent steamers of the German Lloyd connect now the old and the new world with great success.

Respecting my essay on Money and Banks, I refer merely to the reviews annexed to this volume, and shall only quote here the following remarks of the well known M. L. Wolowski, Membre de l'Institut, in his work: *La Question des Banques*, Paris 1864 pag. 5:

"Un économiste allemand, qui a fait un long séjour aux Etats-Unis, M. Tellkampf, professeur des sciences d'Etat (Staatswissenschaften) a l'université de Breslau, qu'il représente à la Chambre des Seigneurs de Prusse, a tracé le tableau fidèle du désordre produit par une fausse application de la liberté à l'émission des billets de banque; il a parfaitement montré l'erreur de ceux qui s'imaginent qu'un pareil droit dérive de la constitution démocratique de l'Etat." pag. 6: "M. Tellkampf insiste sur le principe si profondément étudié par Sir Robert Peel, que la monnaie sert à la fois d'instrument d'échange et d'évaluateur commun."

With regard to my Essay on the Reform of Punishments and Prisons, I will now conclude by quoting an extract from the "Prisoners' Friend Society Report," in which reference is made to my early efforts in the cause of the reform of prison discipline. It may perhaps be interesting to the reader, to see how the plan I

then proposed, is still remembered and spoken of as containing the germ of the LATER IRISH SYSTEM OF PRISON DISCIPLINE.

The official publication as far as my plan is concerned, runs as follows:

## TWENTY-FIFTH ANNUAL REPORT OF THE EXECUTIVE COMMITTEE.

Agreeably to a requisition of law, the Executive Committee of the Prison Association of New York submits its Twenty-fifth Annual Statement to the Legislature of the State: — — —

Pag. 3. "Professor Tellkamp supported his motion in a written address of much learning and power. He discussed at length the separate and silent methods of prison discipline, more commonly known at that time as the Philadelphia and Auburn systems. As between the two systems he gave the preference to none; but at the same time he advocated a system made up of the two—a sort of eclectic method—as, upon the whole, superior to either. He animadverted upon the tendency of the Philadelphia system to produce mental imbecility and insanity, and upon the cruelties practised under the Auburn system. He was especially earnest in his opposition to the contract system of prison labour as both wrong in principle and injurious in its influence on the convicts, since it wholly overlooks their moral amelioration, and treats them simply as so much machinery to be employed in the production of wealth. He gave an interesting outline of a plan of prison discipline presented by himself to the Cabinet

of Prussia and adopted by the government of that country, under which the houses of detention were to be constructed upon the separate plan; the penitentiaries were to be organized in three departments, forming three successive stages of imprisonment,—the first on the Philadelphia system and the other two on the Auburn plan; the last stage, however, to be so conducted as to properly prepare the convict for his return to society. The cells of the convicts undergoing imprisonment in the first stage would be constructed on the separate plan; those for the prisoners in the second and third stages to be more spacious and airy than is common in penitentiaries on the congregate system. Every prisoner would have it in his power, by diligence and good behaviour, to be advanced from the first to the second, from the second to the third stages. In the last two stages the convicts would be classified according to character and conduct and would be continually advanced to higher degrees of liberty and privilege, in such a way, that imprisonment would gradually, and as it were, imperceptibly, melt into freedom. Thus the hope of a constantly improved condition would encourage exertion, beget patience, promote industry, and act both as a stimulus and aid to moral amendment. Punishments would be mainly moral, consisting in degradation from a higher to a lower class or department, and such a character of flexibility would be impressed upon the discipline, that it would be possible to avoid the gravest objections urged against both the separate and congregate systems, uniting the good and eliminating the bad features of each. We have here, in outline, developed, at the first meeting of the

Prison Association, the germ of the IRISH PRISON SYSTEM, which has since become so famous, and is by common consent regarded as the best ever devised by the wit of man."

Respecting this plan of prison discipline, which I had proposed at Berlin, and which was approved there by the Cabinet, the following notice appeared:

Académie des Sciences morales et politiques. Exposé de l'État de la question Pénitentiaire, en Europe et aux États-Unis par M. Ch. Lucas. Membre de l'Académie.  
*Paris* 1844. pag. 79.

"On lit dans la Gazette d'Augsbourg du 16 Février:

Prusse. Il paraît que le système pensylvanien perd des partisans presque partout en Suisse, en Angleterre et en Allemagne. Cette affaire a été discutée dans une séance spéciale du conseil d'État. M. Tellkampf, ancien professeur au Collège de New-York, qui avait écrit contre ce système et M. le docteur Julius, qui a écrit en faveur du même système, avaient été invités à venir soutenir leur systèmes respectifs. Suivant les feuilles de Berlin, à la fin de la séance, toutes les voix étaient pour le système de M. Tellkampf. D'après le Journal du Weser, M. Tellkampf vient d'être nommé professeur d'économie politique à l'université de Berlin."

This plan, the advantages of which have been completely established by the experience of its operation in Ireland, appears to me to have lost none of its interest for Germany at the present day, and to be as capable as ever of immediate application.

With regard to the reception, which it met with at that time in Berlin, Baron A. von Humboldt wrote



me a letter, of which I give an extract in the following translation:

Baron ALEXANDER v. HUMBOLDT wrote me (then in Hanover from New York).

*Berlin* the 14th Nov. 1843:

Many hearty thanks for your confiding letter. My employment is that of a man who has been a long time on shore and has seen many ships sailing by him. Knowing as I do the affairs from close observation I must advise and counsel caution.

To the most favourable impression which you have made through talent, knowledge and modesty upon the King and all his Secretaries and the Counsellor of the Cabinet Mr. Müller, I have nothing to add. They find you valuable for the University and almost indispensable for the projects of the penitentiaries. I consider it therefore as certain that we shall gain you for the Fatherland in an honourable manner rewarded, — now or after a year. But what will you do now, since you cannot write for a leave of absence? Time has its laws; and you must have certainty before the 23d of November.

The King returns the evening of the 18th &c. &c.

In friendship and esteem Yours

A. v. HUMBOLDT\*

\* Das deutsche Original dieses Briefes lautet in den oben mitgetheilten Stellen folgendermaßen:

„Vielen herzlichen Dank für Ihren so vertrauensvollen Brief. Mein Geschäft ist das eines Mannes, der lange am Ufer gewesen und viele Schiffe hat vorbeisegeln sehen. Da ich das Treiben in der Nähe kenne, so muß ich Vorsicht predigen und raten.

As to the last Essay on German and English civilization I have only to observe, that I merely intended to discuss in it the views alluded to in the dedication, and to point out the analogy in the origin and progress of civilization in the two countries.

That my Essays may be of some practical use to my countrymen, is the wish with which I offer the results of long and continued study and investigations to their kind and indulgent reception.

J. L. TELLKAMPF.

*Berlin 1. Mai 1874.*

Zu dem günstigsten Eindruck, den Sie durch Talent, Kenntniß und Anspruchlosigkeit bei dem Könige, allen Ministern, und dem Rabinetsrath Müller hinterlassen, ist nichts hinzuzufügen.

Man findet Sie für die Universität wichtig, für die Zellular-Projecte fast unentbehrlich. Daß wir Sie also für das Vaterland, auf eine anständige Weise besoldet, gewinnen werden, halte ich für ausgemacht, jetzt oder nach einem Jahre.

Was sollen Sie aber jetzt thun, da um Urlaub nicht zu schreiben ist? Zeit hat ihre Befehle. Sie müssen Gewißheit haben zum 23. November.

Der König kommt erst den 18. Abends zurück 2c. 2c.

Mit der freundschaftlichsten Hochachtung

Ihr gehorsamster

A. v. Humboldt."

## REVIEWS OF THE FIRST EDITION.

The first edition of the following Essays was printed in January 1859 and published in London by Messrs Williams and Norgate.

Of the numerous reviews which appeared of the work both in England and America, soon after its publication, the following are more particularly deserving of attention:

1. The Examiner said in the number of Saturday, September 24. 1859:

*Essays on Law Reform, Commercial Policy, Banks, Penitentiaries, &c., in Great Britain and the United States of America.* By J. L. Tellkamp, LL.D., Ph. D., Member of the House of Peers of Prussia, Professor of Political Science in the University at Breslau. Williams and Norgate.

Professor J. Louis Tellkamp has been many years distinguished as an acute student of the social and political institutions of the allied races in Germany, England, and the United States. Not content with the mere reading of authorities, he has freely devoted time to personal research in England and America. His reputation is high in his own country, and it was by order of the King of Prussia that he came among us thirteen years ago, studying our new systems of prison discipline as he studied those also of America and France. Dr. Tellkamp is a law reformer, an expounder of sound principles of free trade, and a clear reasoner upon Currency and Banking. He has full sympathy

with the liberal policy of England, and as a Prussian feels that he is half an Englishman. The last essay in this thoughtful volume is, indeed, upon German and English civilization, showing their similar development as the result of a similar origin, character, and history. The writer is proud to remember that the Saxons from the earliest times had a representative system, and that there was for a thousand years an united Germany until, weakened by discord, it was dissolved in 1806 by Napoleon. Only Prussia now enjoys constitutional life, but, says the Professor, let Americans and Englishmen look back into the past and recognise the source of their most cherished privilege of independence.

Professor Tellkamp's Essays, written in good English of his own, are to be most heartily commended to the English reader.

2. *The Literarg Gazette*, A Weekly Journal of Literature, Science, Art, and General Information, Nr. 71. Vol. III. London, Saturday, November 5, 1859, contained a long review, out of which a few passages may be extracted:

*Essays on Law Reform, Commercial Policy, Banks, Penitentiaries, &c., in Great Britain and the United States of America.* By J. L. Tellkamp, LL.D., Ph. D., &c. (London and Edinburgh: Williams & Norgate.)

The title of Dr. Tellkamp's work affords sufficient evidence of the extent and variety of the subjects to which his attention has been devoted. Questions of such importance as law-reform, international policy in matters of commerce, the theory and practice of banking, and

the penal and reformatory treatment of criminals, are not to be handled lightly, or without long and careful study: and when we add to these a disquisition on the similarity of origin and development existing between German and English civilisation, we are compelled to acknowledge at least the versatility of the genius by which subjects so various are successively, and, on the whole, far from unsuccessfully, grappled with. Considering the variety of the matters of which they treat, it could scarcely be expected that Dr. Tellkamp's Essays should all be of equal merit. And, in fact, their author is far more considerable as a practical and financial politician than as a legislative reformer. Those, which relate to Commercial Policy, to Money and Banks, and to the Reform of Punishments and Prisons, are not only clear and able statements of the questions with which they deal, but possess also so many points of interest as to be well worthy of a brief examination.

The first of these three Essays contains an account of the peculiarities and practical working of the German Zollverein, or Union of Customs and Commerce, together with an earnest exhortation to England and America to effect a practical junction with it, by reducing their respective tariffs of customs to the same level as that adopted by this association. Dr. Tellkamp, as a patriotic Prussian, is naturally a warm admirer of a system of which Prussia was the originator, as she is now the most important member. Nor is his admiration without due grounds: for the Zollverein tariff appears to be decidedly less oppressive, both in its home and foreign relations, than that of any other commercial country.

The next Essay is of a more directly remedial character, consisting in fact of an inquiry into the best method by which the recurrence of the catastrophes occasioned by what are commonly called Bank-Crises may be prevented for the future. After pointing out very clearly and concisely the nature of the two functions which money has to perform, viz., those of a common measure of value and a common medium of exchange, and showing that, owing to the comparatively small fluctuations in value to which they are subject, the precious metals are better suited for both these purposes than any other materials, Dr. Tellkamp proceeds to inquire into the uses of paper-money, and the evils arising from its abuse, and is thus led by a natural transition to examine the defects which, in his opinion, are inherent in the system of banking, as practised in this and other countries. The chief fault lies in the combination of the three functions of deposit, discount, and issuing of paper-money: and the remedy is to be found in the complete and absolute separation of the third from the two first of these functions. The general features of Dr. Tellkamp's plan admit of brief and easy statement. In every country there should be but one quarter whence bank-notes could legally be issued. This should be a Board of Issue, consisting of a body of men specially appointed for the purpose, whose duty should be to issue a certain amount of paper and who should have no interest whatever in the quantity issued. This quantity should be regulated solely and exclusively by the amount of coin or bullion actually deposited. By this means the danger of an over-issue would be effectually prevented, since every

note in circulation could be instantly redeemed on demand. The Board should be compelled to publish periodically a full account of their proceedings, including a complete list of the number of notes of each denomination actually in circulation at the time. The issue of paper-money being thus provided for, the discount and deposit business might be left quite free to be carried on by any individual or any company: the only precaution taken being to enforce the unlimited liability of each individual member of such company. In all essential points this plan is similar to that approved by Lord Overstone, and proposed by Sir R. Peel, in May, 1844, as the basis of a new system of banking: the principal difference being that in the latter scheme Government securities were admitted to a considerable extent, as a foundation for the issue of paper-money. Dr. Tellkampff meets the objection derived from the fact that the issue of bank-notes is a source of legitimate profit to the issuers, by the observation that any such individual gain is far more than counterbalanced by the enormous public losses occasioned by the frequent bank crashes, which are so common under the present, but would be impossible under the new, system.

The Essay on the Reform of Prisons and Punishments is the longest, and, in many respects, the most elaborate, in the volume. Dr. Tellkampff's opportunities of forming an opinion on this difficult and interesting subject were of an unusually favourable kind, he having been commissioned by the King of Prussia to undertake a tour of inspection of the prisons of England, France, and America, with a view of ascertaining the best model for the reformation of the Prussian system of penal

confinement. He directed his attention principally to the consideration of the advantages and disadvantages of the separate and silent systems; and the conclusions at which he arrives are essentially the same as those which have already been formed in this country from the trial of both systems. He gives the preference to the separate system: but fixes eighteen months as the extreme average period during which it can be persevered in without injury to the physical and mental health of the prisoner, and insists on a discretionary power, to reside with the governor of the prison, of modifying the system when necessary in individual cases. The principal obstacle to the general adoption of this system lies in the great expense which is necessarily incurred by carrying it out with due regard to the physical and moral well-being of the prisoners: the yearly expenditure for 500 prisoners at Pentonville (which Dr. Tellkampff regards as a model institution of its kind) amounts to something over 16,000*l.*, not reckoning the interest of the capital expended on the buildings. Nor can this expenditure be much reduced: for, to take one item only, experience has shown that it is absolutely necessary to provide prisoners under this system with considerably more abundant nourishment than, in most cases, would be at their command as free men. The Essay contains many details of great interest, as well as many sound general views, for which the reader must be referred to the volume itself: the following passage, however, is well worthy, not only of quotation, but of deep consideration:

“The opponents of this measure (that of apprenticing boy-convicts to farmers and artisans) in Eng-



land fear that the whole system will not be sufficiently intimidating, and that poor people will the more willingly incite their children to theft and dishonesty, in order to have them brought up at the public expense. This doubt, however, with regard to such measures, cannot be avoided; for if parents are so completely impoverished, or so heartless and vile, that they seek to rid themselves of their children by leading them to crime, the children should be freely placed in houses of correction, on the model of Parkhurst; for it is these very children, thus neglected by their parents or guardians, who constitute the ever-renewing harvest of criminals. It is precisely here that the root of the evil may be grappled. It is more Christian-like, more consistent with the public safety, and cheaper withal, while they are *young*, and corrigible, and docile,—and upon this docility everything depends,—to train them up to usefulness, than to permit them to live by beggary and theft at the expense of civil society, until at length, hardened in crime, they must be convicted and imprisoned or transported; and this too, at an age when they can as hardly be reformed as an old crooked tree straightened. As has been said, it is impossible, as a rule, to improve *old* criminals, even in the excellent Pentonville prison. The careful nurture of children is the surest preventive of crime, and one of the best means of promoting the public safety. It would be anomalous, therefore, to expend such large sums as is done upon penitentiaries, and to be so sparing of the means necessary for the proper nurture of children. By such badly applied economy, society brings upon itself the most serious injury; for the public safety is continually threatened and injured by

the ever-increasing number of neglected youths, however the courts and prisons may be filled from the rushing stream of abandoned criminals."

Dr. Tellkamp is as completely English as it is well possible for a German to be. Though a few mistakes may be found here and there, on which it would be ungracious in anyway to insist, he writes English, on the whole, with an accuracy very rarely met with in a foreigner: his sympathies are principally, if not exclusively, with England and America: and in dedicating his work to the Prince and Princess Frederick William of Prussia, he speaks of the connection between his country and ours in the most enthusiastic terms, and is quite eloquent on the results to which it may be expected to lead. The volume is plainly the work of a man who, when speaking of the subjects to which he has principally devoted his attention, is undoubtedly entitled to be listened to as an authority.

3. *The Century*, devoted to Literature, Science, Art, Politics and Economy. New York, Vol. I. Nr. 3, Saturday, April 7, 1860, wrote:

### LAW REFORM.

Our attention has been called to a publication of essays upon "Law Reform, Commercial Policy, Banks, Penitentiaries, &c., in Great Britain and the United States," recently issued by Williams & Norgate, London.

The author is J. L. Tellkamp, a Professor of the University of Breslau, and Member of the House of

Peers of Prussia, who is well known to many persons in this country, and was, for several years, while still a very young man, a Professor at Union College, Schenectady. His talents and acquirements, and the extent of his personal observation of the workings of the institutions of England and the United States, as well as of his own country, aided by a large intercourse with statesmen and men of science, at home and abroad, have enabled him to present views worthy of our attention, and in a manner to enlist our interest. His book, written in unexceptionable English, is attractive in style, and will well repay perusal. While some of his propositions may be regarded as not altogether practical, we find his views in the main, sound, and his theories eminently suggestive.

The subject of *Law Reform* has much engaged the attention, not only of the legal profession, but of all classes of persons whose interests are affected by legislation. The want of harmony in the laws themselves, and in the means and mode of enforcing them, has been a serious barrier to commercial intercourse between the various States of our Union, and is becoming, perhaps, more and more so. Not to speak of the thousands of cases in which legal construction, and consequently the obligation of contracts varies, it is only necessary, in order to bring the subject home to every considerable merchant, to allude to the laws for the collection of debts in the various states. Each one will remember instances in which his own experience, or that of others, has taught him to refuse credit to solvent men, because, if it *should* be necessary to resort to the law, years must elapse before payment can be

enforced; and still more numerous and more disastrous instances, in which State laws have enabled the debtor to set his creditors at utter defiance.

Good laws, and so far uniform as the various interests of our different States will allow, are of the greatest importance to us: not only to our commercial interests, but to our moral welfare. It is, perhaps, not too bold an assertion to say that nine-tenths of the cases of fraudulent failures with which the records of the commercial world teem, are traceable to the inefficiency of our laws; because they furnish a temptation which few debtors, in whose hearts integrity has not taken uncommonly strong root, can resist, when difficulties press them on the one side, and on the other, immunity, gain and example invite them to a course in which they will suffer no worse punishment than the maledictions of their creditors, while all the world beside will receive them on nearly the same terms of social intercourse as before.

If a remedy can be devised by which all may be subjected to; and have the benefit of, good and equal laws, all good men will be glad to lend their aid to its achievement. Professor Tellkamp, in his Essay upon Law Reform, shows us what are some of the requisites to this end, and has given an outline of the means by which it may be accomplished. Those who will read it may gain some new ideas upon this subject, and if they fail to find in it a completely practical plan, may, at least, be aided in devising one that shall be sufficient to the end in view.

Of the remaining essays published in the same volume, we have space but for a very brief notice. That upon "Commercial Policy" gives us a clear sketch of the revenue systems of three countries, the theory and reasons upon which they are based, and their workings; and the tersely stated arguments it contains will approve themselves to the advocates of free trade. The Essays upon Banks, Penitentiaries and Prison discipline, contain many statistics both valuable and interesting, accompanied with observations which prove that the subjects treated of have been thoroughly studied by the author, comprehensively and to good purpose.

A short Essay upon German and English Civilization closes the volume, which, as a whole, we can cordially commend.

4. The *Merchants' Magazine and Commercial Review*, conducted by Freeman Hunt in New York, said in Vol. VI pag. 391, under the title: The book trade:

On Codification, or the Systematizing of the Law, by J. L. Tellkamp. An Article bearing the above title is to be found in the October and January numbers of the "American Jurist." (Where it first appeared:) "In this article there are many important suggestions on the subject of the systematizing of the law, which we would recommend to the attention of those persons who are interested in such a work. The author briefly exposes the basis on which all law is founded, and then considers the present state of the municipal law. After answering the objections usually urged

against codification, he proposes a standing committee, for the purpose of systematizing the present laws, and for arranging and harmonizing with them the laws which shall, from time to time, be enacted. The whole work is written in a brief and concise manner evincing a philosophic spirit."

I.

ON CODIFICATION, OR THE SYSTEMATIZING  
OF THE LAW.

---





# ON CODIFICATION, OR THE SYSTEMATIZING OF THE LAW.

---

## INTRODUCTION.

IN every human society the law must govern, and must control the arbitrary will of the individual; nothing, then, can more nearly interest every member of society than a consideration of this law, its nature, and such amendments as in the course of time may be found necessary to adapt it to the change of circumstances. It will be the object of this essay to examine the advantages of the adoption of a code, or in other words, of the reduction of the law into a system.

To a full exhibition of this subject, it will be necessary at the outset, to explain what we understand by law, and what by code.

The term *code*, we understand to mean a system of law, and would not apply it to those collections of the laws of a country, which have been made without regard to order, and are a mere succession of volumes without plan.

By *system*, we mean the harmonious arrangement of any number of parts, which appear in their full bearing and importance only when considered as a whole. In this sense, we speak of the system of the heavens, the human system, and others. A system of law, accordingly, is nothing but the form to which its various parts may be reduced, and which is pervaded by a rational principle. We must consider whether the nature of law is such as will admit of this form, and what in that case will be the best arrangement for rendering it more easy of comprehension, application, and amendment, as circumstances may require. For as the human body, which is a form in which man's physical existence is manifested, is of essential importance to the operations of the soul within, so, in a similar way, the form in which law is contained is of essential importance to the efficiency of its animating principle.

The small number of statutes existing in the early history of our race, made it easy to retain them in the minds of the whole people, and they, consequently, had little occasion to regard the form in which they were embodied: but, in course of time, the addition of many thousands of new statutes was required, to meet the wants arising from the complications of society; and it is an object, now, of extreme consequence, to discover the best and simplest mode in which these laws may be arranged. If it were not possible to systematize law, it would not deserve the appellation of a science.

If, with a view to such an arrangement, we consider the present state of law in North America, where we would expect to find the simple laws of a new country, we see a confused mass of materials, certainly of very great value,

but whose practical utility is much diminished by the incongruous manner in which they have been heaped together. We must remember that this law is of English origin, and was introduced there when the states were colonies of Great Britain, and that it has assumed its present condition during the lapse of ages, and through different degrees of civilization; we find, therefore, when viewing it in relation to our present circumstances, much crudeness and an almost total want of system, so that it does not readily present the means of gradual amelioration. In America, too, the previous complication has been much increased by the addition, on the part of the various legislatures, of frequent supplements.

As my purpose, however, is not to censure, I have already said enough of this, and refer for ample proof of what has been suggested, to fuller expositions of this part of legal science.<sup>1</sup>

This evil has been of late frequently exposed, and its effects have been often felt in the common intercourse of life. It is now, therefore, a question of urgent importance to find the proper remedy for a disorder, which time is rapidly increasing.

<sup>1</sup> See Lord Brougham's "Speeches" p. 689; Lord Bacon's "Law Tracts", London, 1741, particularly his "Proposition for compiling and amending the laws," "Offer of a digest of the laws;" "Ordinances in chancery, for the better administration of justice in courts of chancery;" Sir W. Blackstone's "Discourse on the study of the law", p. 27; Sampson "On codes and the common law", Washington, 1826, vol. I. p. 20; Hoffman's "Course of legal study", Baltimore, 1836, vol. II. p. 674; "Report on codification of the common law of Massachusetts," made by Joseph Story, Th. Metcalf, S. Greenleaf, Ch. E. Forbes, L. S. Cushing.

To investigate and criticize the many methods proposed for this purpose, would lead me far beyond the limits of this article. This essay examines the theory of the systematizing of Laws in general and its application to the reform of the Law in the United States and in England. It is a subject which is much discussed both in England and in the United States of America.<sup>1</sup>

#### OF THE NATURE OF LAW IN GENERAL.

LET us attempt to understand the nature and meaning of all that is comprehended in the term *law*; for it is obvious that we cannot hope to arrange any materials according to their respective natural characteristics, without being previously acquainted with their nature. The success, therefore, of the present essay, will mainly depend upon our satisfactorily ascertaining this point.

The definition of the word *law* has always been considered one of the most difficult in the whole range of

<sup>1</sup> The Commissioners on Practice and Pleadings in New York, the Messrs. Loomis, Graham, and Field, have recently executed, in the most praiseworthy manner, the Codes of Civil and of Criminal Procedure of New York, by which they have given ample proof that the rest of their great task will be equal to the excellent works, which they have already performed. After such a glorious beginning it cannot fail, that other states will be desirous to follow this meritorious example of New York.

Lord Brougham and his friends have repeatedly treated this important subject in a masterly manner in their propositions for compiling and amending the laws of England. The proceedings of the "Law Amendment Society," under the prudent and indefatigable guidance of Lord Brougham, have shown the ready interest taken by the public in questions of Law Reform, when brought in a popular manner before their notice.

scientific terms, and we need not be surprised at the hesitation with which the question would be frequently met: "What is law?" It is certainly possible for a practical lawyer to pass very well with only a familiar knowledge of business details, and without ever having acquired one idea of the general nature of law; but it cannot be denied that the direction of the present time renders it daily more imperative on all thinking lawyers and statesmen, to raise themselves above the incongruous mass of rules and statutes, and to endeavour to ascertain clearly the leading principles which underlie them.

Let us introduce the philosophical explanation by a brief consideration of some opinions of eminent men; for such a comparison of different views will serve to secure us against contracted or prejudiced opinions. As we are fortunate enough to have within easy reach whatever past generations have accumulated of wisdom, we ought not to neglect consulting it, in determining questions of such vast importance.

From the period when the philosophy of Greece had attained its greatest splendour, we may see a constant conflict about the different ideas of law; and this, sustained through every succeeding age, has continued to our own time. The opinions on this subject, though numerous, may be classed under two great divisions, each of which is distinguished by a predominating character, and each entirely different from the other.

On the one hand, it is contended that there is nothing absolute or essential in the idea of law, but that it is a mere texture of all the external restrictions, which, like the meshes of a net, confine the members of society. These restrictions were supposed to have been entirely

casual, just as any irregular force might have directed. In this view, consequently, law is but an empty shape: in essence, nothing,—in outward form, coercion.

With a few slight differences of opinion, the sophists may be ranged upon this side. Of these, Thrasymachus maintained that “might makes right,” or “that law is the result of force,” and that “wherever is the power, there, whatever takes place, is lawful; and whatever is lawful, will take place.” Thus it might easily occur that one and the same thing should be both right and wrong at once; and thus morality and law would be reduced to a chimera. These ancient dogmas have been revived in our days by Hobbes,<sup>1</sup> Spinoza,<sup>2</sup> Haller,<sup>3</sup> Thomasius<sup>4</sup> and others.

On the other hand, the opinion, that law has a foundation in reason, has, with little differences, been maintained by Socrates, and his two disciples, Xenophon and Plato. The two last differed somewhat in detail, Xenophon, in his *Cyropædia*, representing law as the useful, the expedient, the prudent (an opinion very similar to that of Bentham), whilst Plato,<sup>5</sup> in the first two books of the “*Republic*,” considers law as the ideal good. Both, however, as well as Aristotle,<sup>6</sup> maintain, that the moral is an essential element of law.

<sup>1</sup> His works, p. 598, and particularly “*De cive*.”

<sup>2</sup> *Tractatus theologico-politicus*, sec. 1: *Tractatus politicus*.

<sup>3</sup> The restoration of the science of government (*Restauration der Staatswissenschaft*).

<sup>4</sup> *Fundamentum juris naturæ et gentium*, 1705.

<sup>5</sup> *De republica*; *De legibus*, libr. 12; *Politicus sive de regno*.

<sup>6</sup> *Politicorum*, lib. 8. *Æconom. lib. 2*.

This latter view received its clearest exposition and most efficient support from the introduction of the equitable and charitable principles of christianity, which necessarily extended its influence over morality and law. The christian idea of the dignity of the individual before God introduced also into the law the recognition of the rights and dignity of the individual. This influence may be remarked in the criminal law, in the mitigation of punishment; in the law of nations, in the milder treatment of prisoners of war, &c. Thus it will be seen that law gradually gave its assent to some of the most eminent principles of christianity. It is upon individuals, and not upon states, that christianity has acted.<sup>1</sup>

<sup>1</sup> This religious influence, assisted by the more extended intelligence of modern times, has produced that rational freedom of the individual which is a striking characteristic of our age. This freedom consists in man's being governed by reason and conscience, and not by compulsory and irregular influences, whether by his own passions or from external force. The only mode of estimating man's real freedom is the comparison of his actions with the law of reason, or, as Cowper says,

"He is the freeman whom the truth makes free,  
And all are slaves beside."

Such a freedom, being dependent only on the law of reason, requires, of course, no special form of government, whether republican, monarchical, or any other, for its enjoyment, but only a right administration of the law of the land. It is not the power of authority that abridges freedom and weighs unjustly; it is the arbitrary exercise of power, its being made to conquer right and reason. The freedom of the citizen, in the ancient republics of Greece and of Rome, was nothing more than the sum of the privileges which he enjoyed at the expense of slaves and barbarians without number; he himself was anything but free, being in every respect subject to the uncontrolled authority of the people: the individual was counted as nothing, when conflicting with the famous

It has, by rendering the state of man more civilized, made it more peaceful and consequently more lawful.<sup>1</sup>

This latter view was further sustained by the spirit of the Roman law. This law has exhibited such a fund of reason in its unequaled development of the most intricate relations, particularly in those of property and of contracts, that from its character in this respect, more

“*Salus publica*,” or general interest. Neither were Greece and Rome, even in their best estate, adorned by citizens who could claim any other title than that of Greek and Roman citizens, the idea and title of citizen of the world being then utterly unknown among those nations. They looked upon all other portions of the globe than their own country, as barbarous, and could not form a conception of any other kind of freedom, than that which was possessed in Athens or in Rome, and which they shared reluctantly with others.

The present civilized states of the world have no such citizens, indeed, as formed the nations of antiquity, but have, instead, that universal, individual freedom, whose foundation lies in reason and intelligence. The privileged freedom of antiquity, of course, lost value by becoming common, and sunk to utter worthlessness, when, on the fall of the Roman empire, it ceased to be a privilege, by being diffused among all nations. The modern christian freedom, on the other hand, becomes more precious with the increase in numbers and knowledge of those who are admitted to it.

<sup>1</sup> Some philosophers, as Hobbes, reasoning from the records of history, think that war of all against all is the natural state of man; and others have arrived at the same conclusion by observation of the uncivilized character. In this they appear to mistake. War is certainly the natural consequence of barbarism, when, for want of better arguments, fists or clubs are used, as we daily see among the uneducated of our own cities. Among them, the criterion of rank and honour is the degree of the development of the body only. But the natural state of man is that in which all his powers are developed, as well of mind as of body, and in which he is governed by the dictates of reason. This state certainly cannot be said to be artificial, for whoever would say that, would declare our reason to be artificial, and our bodies the only part to be cultivated.



justly than from its regard to the freedom of the individual, which it does not always exhibit, it has acquired the title of "Written Reason" (*ratio scripta*). It has, to a great extent, practically realized all that the most distinguished philosophers of the second party have ascribed to their ideal of law. It has, consequently, by a development of the true principles of reason become an essential part of the law of all ages and nations. Christianity had, previous to its last compilation, exercised much influence on the Roman law.

Lastly, the nature of law, according to this view, has been expounded by Blackstone,<sup>1</sup> Hooker,<sup>2</sup> Hume,<sup>3</sup> Grotius,<sup>4</sup> Montesquieu,<sup>5</sup> Jean Jacques Rousseau,<sup>6</sup> Leibnitz,<sup>7</sup> Wolf,<sup>8</sup> Hoffman,<sup>9</sup> Kant,<sup>10</sup> Fichte,<sup>11</sup> Hegel,<sup>12</sup> and Krause.<sup>13</sup>

This second view of the law, I hold to be the true one, and I shall now proceed to explain my own opinion. It might be inferred, that the foundation of law must be laid in an innate faculty of man's soul,

<sup>1</sup> Analysis of the laws of England, ch. 1.

<sup>2</sup> Ecclesiastical Polity book 1.

<sup>3</sup> Essays, particularly that on human nature.

<sup>4</sup> De jure belli et pacis, lib. 3.

<sup>5</sup> De l'esprit des lois, livre 1.

<sup>6</sup> Du contrat social, ou principes du droit politique.

<sup>7</sup> Nova Methodus discendæ docendæque jurisprudentiæ ex artis didacticæ principiis in parte generali præmissis, experientiæque luce. Cum præfatione C. L. B. de Wolf. Lipsiæ et Halæ 1748; Principia philosophiæ; Codex juris gentium diplomaticus.

<sup>8</sup> Natural law, 1740.

<sup>9</sup> Course of legal study, vol. I. præm.

<sup>10</sup> Zum ewigen Frieden, 1795, and Metaphysische Anfangsgründe der Rechtslehre, 1797.

<sup>11</sup> Grundlage des Naturrechts, 1796.

<sup>12</sup> Philosophy of the law, p. 34, 63, &c.

<sup>13</sup> Philosophy of the law, part I, ch. 1.

and consequently one common to all men, from the fact that all nations have been known to possess certain invariable or surprisingly similar laws and institutions, whilst the individual laws of each have no connection with one another and seem to have sprung from local and other incidental causes. We may derive a further support of the inference, that there is this common principle, from the unanimity in the answers given by individuals even of the most different nations, who may not have made a study of the law, to questions relating purely to justice and injustice. This unanimity will be found to hold to a greater and even surprising extent in young persons, whose answers will generally be simply guided by the dictates of reason and conscience.

All those great questions which relate to man as such, as a being responsible to a superior, and as a member of society, will be reduced by the clear and unprejudiced minds of youth to the purest moral standard, and will be answered in a beautiful and unanimous accordance with the influence of truth. Truth, at that age, receives from the still candid mind an entire and, as it were, instinctive veneration and adoption, and occasions an instantaneous repugnance to the distortion of its own eternal principle. It is then apparent that morality and law are really but one principle in essence, though different in form and application; since both lie in the reasonable nature of man, both decide between right and wrong in action.

For a still further proof of this latter opinion, we turn to a consideration of the law of nations, which is based upon a number of general principles, which all civilized nations have harmoniously regarded as reasonable and

necessary for the welfare of all, and have consequently declared to be binding upon all.

Another proof of this opinion is the destiny and ultimate end of man. In this earthly state his end and destiny are, as we know, so to shape his course, as perfectly to develop his entire being in all its relations to the Creator, to himself and to the world about him. The development of the reasonable and moral nature being thus the object of man's existence, it will be necessary for the laws under which this object is to be effected, to be laws derived from his reason and moral sense. Consequently, it is not the power, but the unreasonableness of a law, which makes it weigh heavily upon human nature.

From what has been said we may infer that the source of law is in the ideal. We may *define* law as the result of reason applied to the external affairs of man; when applied to the internal affairs, it is called morality.

There is, as was remarked above, something ever constant in the reasonable thoughts of the human race in all ages, times and countries, which seems to indicate a system of controlling rules of the mind, and was originated in our souls by God, as the infinitely and absolutely rational and just being.

The power of thinking is not itself any rule capable of definition by words, but a faculty under the direction of the rules of reason, ever ready to decide the various questions submitted to its jurisdiction.

It cannot be justly supposed that moral beings, on account of the freedom of their will, were not governed by rules of absolute accuracy; for the partial reduction of the mental processes to orderly and accurate systems,

as we see in logic, &c., indicates that the laws of the moral nature are as invariable as those of the physical world.

It seems, then, that the eternal principle which orders all things in the world, is the same which is found to pervade and direct the very being and essence of man. It is called in that form *reason*, and is seen to incline the actions of mankind to a general conformity to its own rules; and in this case we have termed it *law*. Law, therefore, appears, in the abstract, as the image, the ideal, of a perfect uniformity between man's actions and this divine principle. This law is positive and affirmative, able to exhibit all the conditions of a free, reasonable life; and is not merely, as it is commonly supposed, a collection of the restraints imposed upon the freedom of human action.

A perfect system of law we could consequently call the reign of reasonable freedom, or the government of the reasonable mind carried out in the external world, and it would be, therefore, what Leibnitz calls a reign based upon laws: "*Civitas Dei*."

Since some philosophers and statesmen have looked too much to the free will for the source of the law, not sufficiently discriminating real freedom of the will, it is necessary that we make a few remarks on this subject.

The source of the law is, as we have seen, reason,—but its enacting power is the will, which, in order to be free, must itself follow the direction of reason,—otherwise it would be wilful and unreasonable, being under the impulse of passion. Taking also will into consideration, we can give the following definition of law, which will be found to agree with the previous

one. Law is the determination of our will, in accordance with reason.

One, who may never have introduced into his mind the government of reason, may fancy himself free, when his actions are wilful and without restraint, but, acting, as he thus acts, under the arbitrary impulses of his own nature, and without exerting over his will a rational control, he only shows himself not free. He that exerts his will according to the rules of reason, will be seen to act not as an isolated individual, but in harmony with an eternal principle. In acting, he will be less prominent than the actions themselves; whilst, on the other hand, the man who perversely acts without regard to reason, will exhibit more prominently his own depraved individuality. Reason is the highway in which all may travel without making themselves conspicuous.

When a great genius has executed a master piece of art, spectators cannot help exclaiming that it is right, which means, that truth has been represented, and the author's individuality suppressed; that no mannerism is visible. Raphael has no mannerism; his figures seem to have life, and stand forth from the canvas. It is, therefore, a narrow and false principle, to hold that arbitrary might can constitute right. For it is only the might of reason which can obtain for a law the universal and permanent consent of mankind. This will fully explain the cause of the gradual decline of all those laws which are contrary to reason, even though in the first instance they may have been established by the power of physical or other accidental force. The chief principle of a law which shall hope for permanence, is to be found in the degree of its approach to the reasonable

in man's nature. For man, being a creature endowed with reason, cannot be expected long to submit to be governed by laws which are not founded in reason. It is not consistent for a reasonable being to be governed by any thing unreasonable. And it is proved by experience that laws of the latter description have never been able to endure for a great length of time.

In proportion as statutes shall approach the inherent principle of man's reasonable nature, in so far will be the advance of men to meet such statutes; as the acknowledgment of truth, whether in jurisprudence, in morality, or in any other science, is instinctive and natural. As it is obvious that under certain conditions the development of the public mind may not be such as to enable it immediately to appreciate the higher and better applications of reason, while it is at the same time necessary that truth shall in the end, as public intelligence is increased, be perceived and adopted, it is therefore of manifest importance that legislators should be the most intelligent and rational men of the community. For it is far better, that the laws should be even in advance of the public mind, and thus require the latter to be elevated, in order to attain their level, than that they should be below it, and thus either sink it in the scale of improvement, or destroy at once the respect and ascendancy which they ought to maintain. With good laws men will become better, and with bad laws they may become worse, as may be seen in the example of some of the old criminal laws, and those for the imprisonment of debtors. In any case these laws can and ought to be derived from reason, adapted to the condition and wants of the people according to their historical development.

As, therefore, the law of a nation must in all its ramifications be deduced from reason, it follows, that law will be of a more or less elevated character, according to the greater or less advance which that nation shall have made in the development of its reason. The degree of that advance will be the measure of the state of the law by which it is or ought to be governed. Distinctive elements are besides given to it, by the leading features of the nation, by its history, and by the modifying influences of climate, geographical position, and other circumstances.

#### NATURE OF COMMON LAW.

LAW, as previously exhibited in its purity and conformity to reason, forms only the fountain head of all statutes, and is very seldom found in its perfection in practice. The reason of this fact is not merely to be found in an imperfect development of the public mind, which would prevent its appreciating truth and justice, but also in the many counteracting elements of society, such as self-interest, the passions, and which, like the opposing force of *vis inertiae* in mechanics, require the application of uniform and continued power to produce the proper effect. Thus, though truth has an irresistible claim upon the human mind, and will at length be recognised and adopted, yet those who first propose it, when the intellectual condition of society is opposed to it, or unprepared for it, may often fall martyrs to their own cause from not possessing themselves of this simple principle. Those, therefore, who would bring forward truth, must be persevering and courageous, and,

if possible, connect it with power, in order to exhibit it properly, and make it felt.

Consequently, what is reasonable in itself must first have power on its side before it can establish itself as law; and this must be the legislative power, and that legislative power must be highly intelligent.

From history we learn, that, on account of this conflict, the influence and progress of truth upon great masses have been like the motion of a vessel beating against the wind; for the most reasonable part of the community is drawn from its straight-forward course by the passions and self-interest of the other, and may congratulate itself, if its course be at all progressive.

Law is classified according to the different objects to which it is applied. We may here take one general division from the Roman law; this will be into public and private. Public law, *jus publicum*,<sup>1</sup> appears under the form of the law of nations, and of the constitutions of nations or states, whether written or otherwise; private law, *jus privatum*, is what governs the relations of individual members of society, or what in English is called municipal law.<sup>2</sup>

The first, public law, though not yet reduced to a code, as respects the law of nations, can still in its other departments be seen systematized in the constitutions of the several states of the American union;

<sup>1</sup> Publicum jus est, quod ad statum rei romanæ (rei publicæ) spectat; privatum, quod ad singulorum utilitatem. Justiniani Instit. lib. 1, tit. 2, § 4.

<sup>2</sup> Kent, in his Commentaries, vol. I. part 3, lect. 20, page 447, defines municipal law, as a rule of civil conduct, prescribed by the supreme power in a state. It is composed of written and unwritten, or statute and common law.



whilst the English are so familiarised to the enjoyment of their liberty, that the constitution of England seems to me *to live* in the whole nation, and thus to have the best possible form. We are struck with admiration beholding the various parts of this constitution which displays so much harmony before us.

In the last form, it being fully and distinctly written down, I confine myself entirely to municipal law (*jus privatum*). This is divided into common law and statute law, which differ in the nature of the power by which they have been established, the one being by custom, the other by legislative authority.

The common but erroneous opinion, that the greatest part of all law is the work of a regular legislative authority, will make it the more necessary to give a distinct account of the origin and nature of common law. To look for this immediately under the form of distinct statutes would be in vain; it is not so formed. First, we may see it in the guise of manners and customs, which represent the permanent features in the general character of a nation. These permanent features, as remarked before, are formed as well from the individuality of the nation, as from the circumstances of soil and climate. Manners and customs, therefore, are the first expressions of the law, which will continue forming, with the whole spiritual and physical life of a people, and will be modified by increasing knowledge, by the forming of new relations, and by the change of necessities. They will become, like language, perfectly blended with the nature of all who may have grown up with them; but will gradually disappear, if unable to adjust themselves to the alteration of circumstances. The

common law, therefore, of every nation should be considered as a member of its body, and by no means as a robe, that has been fashioned at pleasure, and may be cast off at will.

The same power of man's soul, which has been seen to be the origin of all law, will also impart to the most complete state of jurisprudence a forward or a retrograde motion. A perfect state of rest is as little to be expected in law as in life, or in language, or in customs; so that there has never yet been a code which had not in fifty years, by addition and new habits, lost much of its original character. Law cannot be said to spring from legislative acts or statutes alone; on the contrary, statutes ought to be principally the expression of the legislative sanction of what has, by its consistency with reason, established itself in the law of custom. As only that part of the common law which has already been definitely fixed, can have been written down in statutes, and as we have already said that this law has been developing itself in past time, and still, and continually develops itself by custom, it will be readily seen, that it can never, at any one time, be entirely a written law. The real source we have already shown to be in man's consciousness, and the source of all additions to it, at all times, must be the same. But as these accessions are made by custom, it will be quite clear that customs should only form themselves into law, in as far as they are true expressions of this consciousness.

This law of custom, this result of the constant application of the reason of all the people to the circumstances and wants of all the people, is obviously the

largest field for the application of those original principles of law.<sup>1</sup>

In the development of common law, out of the general consciousness of the people, the following constant reciprocity will be found to hold; ideas proceeding from certain intellectual men sink into the hearts of the people, are found in the daily intercourse of life to have a real practical value, and are by degrees variously and extensively improved upon. At the same time, those ideas which happen to exist in the minds of the people, and in the spirit of the times, will be found to exercise a great though imperceptible influence on the rising generation of intellectual men, who, as we are taught by history, have been then only really great, when they rightly interpreted the tendencies of the age and of the people, and guided the latter with all that commanding energy and moral distinctness of purpose, which so emphatically mark extraordinary characters.

In this action and reaction common law will be developed and perfected; but it will not possess any constraining force until it shall be acknowledged as a general rule by all or the greater number of the people; its validity will, therefore, entirely depend upon its appearing that there is a very general consent of all par-

<sup>1</sup> The Romans acknowledged reason, *ratio*, to be the foundation of common law, by requiring the *consuetudo* to be *rationabilis*.

My dissertation: De longa consuetudine, page 5—12; Corpus juris civilis, Lex 2, Codicis, lib. 8, tit. 53: Verum non usque adeo sui valitura momento, ut aut *rationem* vineat, aut legem; and, Institutiones Justiniani, lib. 1, tit. 2, § 9: Ex non scripto jus venit, quod usus comprobavit, nam diuturni mores consensu utentium comprobati, legem imitantur.

Novella 134, cap. 1. Malæque consuetudines neque ex longo tempore, neque ex longa consuetudine confirmantur.

ties in its favour. The agreement of a few individuals, it is evident, could never be taken as authority in this matter. Habits and customs thus grow into law, and their guarantee is contained in the will of the majority. Undoubtedly there are many of a different mind, who may never have agreed to those laws which they are notwithstanding obliged to obey, and which they may certainly look upon as coercive, but there is no help for them. If we examine the matter closely, we shall find, that the greater part of all laws, both public and municipal, has originated in the superior will of the more powerful or intellectual. It is certainly a weak side of this law, that it thus depends upon the will of the majority; for the greater number of votes is no clear proof of the truth and justice of the decision; it is quite possible for the minority to be the wiser and the better instructed. Therefore, according as the laws have been made by physical or intellectual force, they will be selfish or reasonable, partial or universal, good or bad. The only remedy that can be applied to this evil is the greater diffusion of knowledge among the people.

Common law is thus popular autonomy, and, inasmuch as it is formed by the spirit, not of a single legislature, but of a whole people, during a long succession of ages, belongs truly to them, as an heirloom, which their fathers have held from time immemorial, and have transferred to them, and which they may doubtless modify for their own use; but whose character they should carefully preserve and leave unmutilated to their descendants.<sup>1</sup> Such laws only are dear to a people, and

<sup>1</sup> It is a noble and true opinion which the compiler of the Saxon law has expressed in the following words:

in their estimation infallible. They have imbibed them with the traditions of the oldest inhabitants, and have known them since childhood, and have seen them existing under the same roof with themselves. Custom law or common law may therefore in all reason be considered an inseparable mixture of sacred and common ingredients. And though its origin be mystical and obscure, the strong and ardent attachment which the people bear towards it, may still be easily explained from its having continued with them from the period of their earliest recollections.

Law, when left in this manner to its natural progress, will conform itself to the internal characteristics of the people. This natural course is invariably found to be in accordance with certain general customs which, when carefully studied, will be seen to contain the germs of those statutes which shall be suitable at any time to the existing state of things.

From what has been said, it will be acknowledged, that from its nature the common law has a stronger hold upon the people, and is more equitable than statutes, which may be temporary and partial. From its forming a part of the life of a nation, it will be as difficult to alter it suddenly to any considerable extent, as to change the habits of an individual. A nation may be more easily subdued, than changed in its habits and customs.

In accordance with this fact, the German tribes, bar-

"This law, 't is not of my invention,  
'T was of old handed down to us  
By the wisdom of our forefathers."

In the language of the original:

"Dies Recht hab' ich nicht erdacht  
Es habens von Alter uf uns bracht  
Unsere gute Vorfahren."

barous as they were commonly considered, showed much sound sense in so constructing their institutions upon the ruins of the Roman Empire, as to permit all those subjected to them to live according to the laws and customs of their respective countries.<sup>1</sup>

Napoleon, on the other hand, it must be granted, whatever opinion be entertained of his code, showed little political judgment, or great disregard for the principles of human nature, in compelling its summary adoption by the nations whom he conquered.

But with all the advantages above-mentioned, common law is attended with considerable difficulties. In a nation, just rising in the scale of civilization, inhabiting a small extent of country, and still simple in its institutions and interests, there may exist a great degree of simplicity and unity in its common law, so that it may be preserved in the memory of the people. But when these institutions and interests shall have become, as in the present day, greatly complicated, and be coupled with the diffusion of a scanty population over a vast country, it will be impossible to expect the same opinions and ideas to prevail in regard to particular customs; and the more impossible, if with the increase of civilization the employments of the people have become the more distinct and subdivided, so that what was formerly done in common has now been assigned to particular classes; for the jurists compose one of these classes, and through their labours a direction is given to the law.

<sup>1</sup> Marculfi form I: "tam Franci, Romani, Burgundiones, quam reliquæ nationes sub tuo regimine et gubernatione degant et moderentur, et eos reeto tramite secundum legem et consuetudinem eorum regas."

In the same manner, therefore, as in simple ages law was found to live in the minds of the whole people, so now it ought to exist in the minds of the jurists, by whom the people must be supposed to be represented in this function. Since then the principles of law, in the course of time, naturally come under the full control of the judges and the lawyers, it is of the utmost importance, that means be devised for thoroughly acquiring a knowledge of law, by a well grounded jurisprudence,<sup>1</sup> and a good civil code; and that each of these should be continually adapted to those changes which the altered state of society may have occasioned.

The unwritten part of the common law, which exists only in the form of custom, is very different from statute law, in respect to its susceptibility of proof. The former derives its only authority from its being known and assented to by every individual, or by the majority, whilst the latter, having the authority of the legislature, offers the most perfect evidence for its support. Common law is not so precise, and a knowledge of its leading principles not so distinct, on account of its being made up of an accumulated mass of details; consequently, the fault to which it is liable is uncertainty of application. Its meaning, therefore, in order to remove the uncertainty, ought to be expressed in precise terms, and its principles arranged in systematic order.

This has been attempted by writing down the customs, and by putting into the form of statutes certain detached portions of this ever-growing law.

<sup>1</sup> It has been gratifying to observe the progress which the law schools have made; which promises well for the wider diffusion of a sound legal science.

In this way these portions have been determined, and sanctioned, and their meaning precisely ascertained, so that they have ceased to be exposed to the changes incidental to this kind of law. But the greater part of the common law has not been so secured, and consequently, its existence must be often proved by protracted litigation. Now, an essential ingredient in the nature of all positive law is compulsion; as otherwise laws would be ineffectual, and be mere empty words.

This compulsion is necessary to all law, but does not exist in the common law, until it is expressly invested therewith, by the public and decisive sanction of the legislature, and thus rendered authoritative in the eyes of the people. To this end common law must be provided with this necessary support, and without it will be less effectual. All principles which are founded on custom, and have any reference to law, ought to be carefully investigated in all their extent and bearing, and be clearly laid down in a general code. But it is not enough to collect together the scattered rules of common law, without principle or system; as such a code would, by reason of its want of connection, entirely fail in its object, and at the same time be deficient, difficult of application, and wanting in precision.

#### THE PRESENT STATE OF ENGLISH AND AMERICAN MUNICIPAL LAW.

UNHAPPILY, it must be confessed, that the common law of England, although its intrinsic merits would well entitle it to a thorough exposition, on account of the excellence of its fundamental principles, has been compiled after the



latter fashion, without any regard to suitable arrangement. Blackstone, in his Commentaries, has proved to the world the possibility of its clear development from those principles. At the same time, it must not be forgotten, that those ancient customs and laws bear many marks of the crudeness and inexperience of the times, so that without being considerably modified, they could not, in many cases, answer the necessities of the present age: and the same may be equally well said of the old English statute laws, which, according to Lord Coke's impartial testimony, confirmed by Blackstone, were compiled in a temporary and special manner.

"For, to say the truth, almost all the perplexed questions, almost all the niceties, intricacies, and delays, (which have sometimes disgraced the English as well as other courts of justice,) owe their original not to common law itself, but to the innovations that have been made in it by acts of parliament, 'overladen,' (as Lord Coke expresses it,) 'with provisions and additions, and many times, on a sudden, penned or corrected by men of none or very little judgment in law.' This great and well-experienced judge declares, that in all his time he never knew two questions made upon rights merely depending upon the common law; and warmly laments the confusion introduced by ill-judging and unlearned legislators. 'But if,' he subjoins, 'acts of parliament were, after the old fashion, penned by such only as perfectly knew what the common law was, before the making of any act of parliament concerning that matter, as also how far forth former statutes had provided remedy for former mischiefs and defects discovered by experience, then should very few questions arise, and the learned

should not so often and so much perplex their heads to make atonement and peace, by construction of laws, between insensible and disagreeing words, sentences, and provisions, as they do.' And if this inconvenience was so heavily felt in the reign of queen Elizabeth, you may judge how the evil is increased in later times, when the statute book is swelled to ten times as large bulk; unless it should be found that the penners of our modern statutes informed themselves better in the knowledge of the common law."<sup>1</sup>

Whatever is true concerning a body like the parliament, would be true concerning legislative bodies everywhere; but in no country is there such a probability of conflict of laws, as in North America, where there are so many legislative bodies in operation.

The English criminal law, formerly noted for its severity, though not a part of the municipal, but of the public law, should be amended and incorporated in the proposed code. Blackstone complains of its rigour<sup>2</sup> and we see from the speech of Mr. Thomas Fowell Buxton, in the House of Commons, March 2, 1819, that its severity had been increasing.

The laws of England punished with death, under the Plantagenets, four kinds of crime; under the Tudors, twenty-seven; under the Stuarts, ninety-six; under the Guelphs, one hundred and fifty-six.

Of late, these laws have been slowly mitigated in England;<sup>3</sup> but with great rapidity in the United States.

<sup>1</sup> Blackstone, discourse on the study of the law, page 29.

<sup>2</sup> Commentaries on the laws of England, vol. IV. chap. 1.

<sup>3</sup> It is hardly necessary to refer to the services done to cri-

In the English common law is contained more of the Roman law than is commonly supposed. Not only have many principles of that law been adopted, but whole sections appear almost as if translated; as, for instance, those of the right of possession; the fundamental principles of contracts; *successio ab intestato*, &c.; thus securing many excellent principles in regard to property and business, and at the same time drawing from the old Saxon law those principles favourable to personal security and freedom. Consequently, the English law, in its composition, at the present time, offers greater intrinsic merits than the common law of most of the countries of Europe. For proof, it is sufficient to refer to the authority of certain well-known jurists. Judge Story not only expresses a similar opinion in his works, but proves by facts, particularly in his "Commentaries on the conflict of laws," the great advantage which able jurists may derive from the study of the Roman law. Chancellor Kent, in his Commentaries, has the following: "But the more liberal spirit of modern times has justly appreciated the intrinsic merit of the Roman system. Sir Matthew Hale, according to the account of Bishop Burnett, frequently said, that the true grounds and reasons of law were so well delivered in the digest, that a man could never well understand law as a science without first

minimal law by the powerful and benevolent mind of the late Sir Samuel Romilly.

The Reports of Her Majesty's Commissioners on Criminal Law, presented to both houses of parliament, manifest the zeal with which the Commissioners have endeavoured to execute the high and important duty committed to their charge and have submitted recommendations for the amendment of the present system of punishments.

resorting to the Roman law for information, and he lamented that it was so little studied in England. And in *Lane v. Cotton*, that strict English lawyer, Lord Holt, admitted, that the laws of all nations were raised out of the ruins of the civil law, and that the principles of the English law were borrowed from that system and grounded upon the same reason." And again, "The rights and duties of tutors and guardians are regulated by wise and just principles. The rights of absolute and usufructuary property, and the various ways by which property may be acquired, enlarged, transferred, and lost, and the incidents and accommodations which fairly belong to property, are admirably discussed, and the most refined and equitable distinctions are established and vindicated. Trusts are settled and pursued through all their numerous modifications and complicated details, in the most rational and equitable manner. So the rights and duties flowing from personal contracts, expressed and implied, and under the infinite variety of shapes which they assume in the business and commerce of life, are defined and illustrated with a clearness and brevity without example. In all these respects, and in many others which the limits of the present discussion will not permit me to examine, the civil law shows the proofs of the highest cultivation and refinement; and no one who pursues it can well avoid the conviction, that it has been the fruitful source of those comprehensive views and solid principles, which have been applied to elevate and adorn the jurisprudence of modern nations."<sup>1</sup>

Mr. Hoffman,<sup>2</sup> in one of his works, says, "The Ameri-

<sup>1</sup> 1 Kent's Commentaries, 546.

<sup>2</sup> Hoffman's course of legal study, second edition, p. 518.

can law student will also with pleasure bear in mind that in all of these, and in numerous other particulars, in the *jus privatum*, we have conformed our law to the Roman model. The truth is, that the numerous departures of the American law which have taken place since the middle of the last century, from the law of our forefathers, have been little else than so many approximations to the Roman code." . . . "Have we not in our codes adopted and amalgamated the doctrines of the civilians to a greater extent than our mother country?"

"We may adopt with perfect truth the remark of Arthur Duck, when speaking of the authority of the civil law in Scotland, that it obtains here as there *in casibus omissis*, for it is unquestionable that there are large departments of our jurisprudence, in which (in the absence of more authoritative law) we may and ought to resort to the civil law for light, for instruction and for authority. We say authoritative law, because, having adopted the particular system as a portion of our scheme of jurisprudence, and that having sprung from the Roman code, we are bound *in casibus omissis* (and so we have done by long usage) to resort for illustration and authority to the pages of the digest and code, in the same manner, and with the same views as we at present resort to the modern British authorities on innumerable other subjects. In our courts of admiralty and maritime jurisprudence, also, and in our courts of equity, on various subjects, as likewise in the law of contracts, of executors, of bailment, legacies, presumptions, accession, confusion, extinguishment, set-off, &c., we should appeal to the civil law with as much confidence as if we were resorting to an authoritative source, &c. The law of Rome, in such

cases, is not, as has been justly remarked by a Scotch writer,<sup>1</sup> our law from any authority, either of the republic or of the emperors; but it is authoritative, because we have made it so (the people exercising the same right as in the formation of their common law) by adopting certain systems of laws which were brought into existence and made known to our forefathers only by the Romans. And these systems are to be found in the Justinian and other Roman codes."

As the wisdom of not passing by unnoticed the Roman law in any endeavours to amend the existing laws has thus been rendered manifest, it may not be considered out of place to give here the opinion of the great Leibnitz on the Roman jurisprudence. *Dixi sæpius post scripta geometrarum nihil extare, quod vi ac subtilitate cum Romanorum jureconsultorum scriptis comparari possit; tantum nervi inest, tantum profunditatis.* "I have often said that, after the writings of the geometricians, there is nothing extant which in force and acuteness can be compared to the writings of the Roman jurisconsults, there is in them so much nervousness, so much profoundness."<sup>2</sup>

This manifoldness, in the English law, expresses at the same time the great activity of the internal life of the nation which could not be restrained to one manifestation, but which has secured for itself the liberty of expanding in all directions. Thus societies and individuals find under such a system an opportunity for the development of their own individuality.

<sup>1</sup> Wilde's Lecture, Edinb. 1794.

<sup>2</sup> Leibnitz. Opera, vol. IV. pt. 3, p. 267.

The danger, however, inherent in its nature would seem to be, that a want of unity and consistency would manifest itself in the adaptation of this law by each state to its own wants, and that the difference thus inevitably ensuing between the systems of the different states of the Union would tend to separate and disorganize. At the same time, however, the common basis of all the codes would prove a bond of sympathy and mutual relation between them. And lest from this same multiplicity there should be a want of certain fixed and clearly defined principles, preserving a harmony throughout, we must seek to find and exhibit a unity in the whole.

These sources of law, so far as they were applicable to colonies, were, it is well known, introduced in North America during the period of colonial administration, and with some necessary modifications were retained after the declaration of independence. It may be said of the confusion of these English laws, just what Livy, long before the appearance of Justinian's code, said of the Roman laws: *Nunc in hoc immenso aliarum super alias acervatarum legum cumulo fons omnis publici privateque est juris*, and what Bacon said of a similar state of the law: "*Non sunt peiores laquei, quam laquei legum; si, numero immensæ, et temporis decursu inutiles, non lucernam pedibus præbeant, sed retia potius objiciant.*" There are also in the Faust of the German poet Goethe, some observations on the tendencies of the common and statute law, unless continually amended so as to suit the altered state of society, which apply very aptly to this subject:

*Mephistopheles :*

Law and statutes are descending,  
 Like disease from race to race,  
 And, contagiously extending,  
 Slowly pass from place to place;  
 Good in time grows bad, unheeded,  
 What was true,—an empty word;  
 For innate rights no voice is heard  
 Since to our fathers we succeeded.

*In the original :*

“Es erben sich Gesetz und Rechte  
 Wie eine ew'ge Krankheit fort,  
 Sie schleppen vom Geschlecht sich zum Geschlechte,  
 Und rücken sacht von Ort zu Ort.  
 Vernunft wird Unsinn, Wohlthat Plage;  
 Weh dir, dass du ein Enkel bist!  
 Vom Rechte, dass mit uns geboren ist,  
 Von dem ist, leider! nie die Frage.”

Although this state of things is found to exist in almost all countries, yet, by an attentive solicitude bestowed upon the adjustment of the individual relations of the people, the English and Americans, aided by the experience of modern times, and an increasing civilization, may effect this great amendment, and thereby gain a high degree of celebrity; and the most satisfactory expectations may be entertained of the future state of their civil jurisprudence, which, from a just regard to their own interests, ought to be an object of the utmost importance to these active and enterprising people. For what greater incentive is there to industry than entire legal security? Who would attempt the cultivation of land, if the rights of property were not protected, and the produce of the soil secured against the cupidity of the first comer? Could industry flourish with-



out that protection, or deprived of the hope of enjoying the fruits of its labour? Industry and legal security mutually depend on each other. They are like the soul and nerves of the human body; working only in harmony when both are in a healthy state. Therefore the English and Americans should be favourably disposed towards the amendment of laws touching in such a variety of ways, and so closely, the roots of industry. They would realize in this spirit the spirit of the Roman twelve tables: *Salus publica suprema lex*. "The public welfare is the end of the law." Thus we shall be enabled to appreciate the evil effects of the uncertainty of the application, rather than want of the common law, upon the prosperity of individual industry. In the following remarks we shall point out some of the most obvious disadvantages.

As we have already had occasion to remark, the amount of legal decisions is innumerable, and is made up of a great variety of materials, which are not sufficiently digested. Lawyers and their clients, therefore, have had great difficulty to understand rightly the leading principles of the law; although, in the daily occurrences of life, the necessity of a recourse to law is continually presented to all persons, and a certainty in its issue is of urgent necessity, but notwithstanding, impossible, without clear and precise definitions. But the abundance of these materials, so far from being viewed as an evil, should be looked upon as of great importance to the advancement of law, if care is taken to regulate and render them easy of access; to separate the useful from the obsolete; and to throw the crude into a more suitable shape; just as with the precious

metals, which must be sought after in the bowels of the earth, and be freed from their admixture with baser ore, before they can be applied to satisfy the wants of mankind. In the present state of the subject, the most important questions may, on the one hand, be decided by laws containing many obscurities, contradictions, and inaccuracies, creating thereby, in various ways, insecurity to possessions and property, whilst on the other hand we should remember, that in a system of jurisprudence all parts affect each other, and that consequently a contradiction can never remain isolated, but must enter, in a variety of ways, into the intricate relations of social life, and render it impossible at all times to guard against its baneful influences. Fraud and artifice find ample nourishment in the inaccuracies and ambiguity of the laws; disputes necessarily arise from laws of doubtful meaning; and the peaceful citizen, fondly fancying himself safe, and in the possession of his manifest rights, finds it impossible to protect himself from the harassing schemes of his malicious opponent. The latter is even assisted by the laws themselves, in consequence of their internal contradiction, in his attempts to involve the former in the dubious, expensive, and dilatory uncertainty of a lawsuit, the issue of which will depend entirely upon the view which may be taken of the controverted matter, by the final authorities; and which, from the contradictory nature of the laws in question, cannot previously be ascertained with any accuracy.<sup>1</sup>

All this may easily happen with even a good case,

<sup>1</sup> Some excellent remarks on this point may be found in the *American Jurist* for October, 1834, in a "Lecture on the alleged uncertainty of the law," by John Pickering.

and with lawyers and judges conscientiously performing their duty. Unjust doubts will then be frequently entertained of the science and capacities of juriconsults, whereas the faulty laws alone are to be blamed. Their amelioration, therefore, is of weighty importance to the true interests of industry, and of the law. And, furthermore, the legal institutions of the olden times of England should not be retained in America without great modifications, in all cases in which they may not be in accordance with the more modern American customs,<sup>1</sup> as they tend to confuse all ideas, and to naturalize much there which was local and incidental in its nature and origin, and which is not suited to the life of America. From these remarks it will be sufficiently evident, that the obscurities, the faulty arrangements, and the contradictions of the laws, must be directly opposed to the establishment of legal security. But legal security is certainly one of the principal objects of a government which shall endeavour to realize the true end and design of its institution.

A more perfect establishment of legal security, attainable only by reasonable ameliorations of the law, being thus among the noblest and most elevated objects of government, the following questions need not excite surprise. Why have civilized nations allowed centuries to roll by without obtaining that legal security which they so earnestly desired? Were they not equal to the task, or did it exceed the capacity of their legal science?

The answer to these questions may be found in the following considerations. On the one hand the exigen-

<sup>1</sup> Montesquieu, de l'esprit des lois, livre 19, chap. 21.

cies of the times have made it necessary for all nations to apply themselves principally to matters of state polity. On the other hand, in France, Prussia, and Austria, codes have been made, and in England and in the United States, also, much has already been done for the amelioration of the private law, by careful revisions of statutes, which have admirably prepared the way for the compilation of a code which would comprehend both common and statute laws.

The digest of the criminal law of England and of the law of procedure, presented by Her Majesty's Commissioners to both houses of Parliament is an exceedingly careful and able work.

After the systematic compilation of the criminal and the civil law and law of procedure of Louisiana, and after some alphabetical arrangements of the statutes, Messrs. Spencer, Butler, and Duer revised and codified, in 1829, the statutes of the state of New York, a work which, for its novelty and the systematic order in which it was completed, deserves the highest praise.

In 1835, Messrs. Jackson, Stearns, and Pickering, were equally successful in their systematic revision of the statutes of Massachusetts. And two years later, a commission, authorized by the legislature of the same state, and at the head of which Mr. Justice Story was placed, in their "Report on Codification," performed a great service to the country, by the clear and able manner in which they have presented to the people the expediency and practicability of codifying the common law.

But the systematic arrangement of the common and statute law, or the compilation of a code, is a measure

against which many objections have been raised. We come now to the consideration of those objections, and we will give them careful attention.

#### OBJECTIONS AGAINST CODIFICATION ANSWERED.

It has been said by objectors, that, 1. No code can be expected to offer such a degree of perfection as would render it absolutely final, and in need of no future improvement; that, therefore, it must be better to leave things as they are, and not to attempt a thing necessarily so imperfect.

2. That it is impossible to give to a code, in regard to its contents, that *completeness* which shall afford beforehand a decision for the endless entanglement of circumstances in real life.

3. That in the compilation of a comprehensive code, many principles and passages may be treated imperfectly, both as regards themselves and as regards other parts of the system, by taking them out of their previous connection; that each point in law enters variously into all the relations of society; that it must be a matter of surpassing difficulty, to calculate in advance and with any approach to certainty, all the effects of those points, in a code which is to contain so many new laws together with so many old ones; and that if those effects are not considered, so many deficiencies and inconveniences will shortly appear, as to render the work totally inadequate to the intentions of its framers.

4. That the new code would draw all attention *towards itself*, and from the fountains of law; so that the connection might be easily lost with the earlier stages of the

science, by the study of which it could alone be hoped to clear up the obscurities of a jurisprudence which has grown with the lapse of time.

Many of the remaining objections have reference only to the actual condition of particular countries; as, for instance, some of those contained in the essay of Mr. von Savigny,<sup>1</sup> a Prussian professor and statesman, would seem to apply chiefly to Germany, where the Roman law forms the great basis of the jurisprudence, and has been worked up with the German, the canon, and the feudal law into a system, which, from its variety, seems particularly suited to the complicated relations of that country; relations which arose out of the historical development of the common bands which have been entwined round the German states, by the Roman Empire, the christian religion, and the Teutonic institutions. For the close investigation and the better understanding of the Roman law, the times are most favourably circumstanced, in the discovery of the Institutes of Gaius, and in the general attention which has been of late directed to jurisprudence, as well of the Roman as German law; so that it would be unadvisable to stay, by the enactment of a new code, the further progress of these not yet completed investigations.

To these four objections, touching all codes in general, the following remarks may serve as preliminary replies.

In regard to the first objection I would say: To demand from a code that degree of perfection which shall render it absolutely final, and in need of no further improvement; and, because of the impossibility of ever

<sup>1</sup> On the fitness of the present age for legislation and jurisprudence. Berlin, 1815, pages 73 and 107. Hugo, in the Civilian Göttingen Magazine, vol. IV. page 89.

attaining such a degree of perfection, to abstain from any attempt at a thing necessarily imperfect, would argue misapprehension of the nature of finite things. As everything in this world is imperfect, it would be extremely irrational to reject all attempts to realize the formation of a code, because the result must be imperfect.

Perfection is meant to denote the full and well-ordered system of all things pertaining to a certain sphere; in this sense no art or science can be considered perfect. But should we, for that reason, abstain from embodying into a system all that is known of a certain subject, just because additions may be made to our knowledge of it; or the more important part of it be still unknown? In this way we should never advance. Every code might be better—so at least idle speculation can affirm; for the noblest, the grandest, and the most beautiful of all the works of art might be imagined more noble, more grand, and more beautiful.

Of the second objection: To expect of a code a minute completeness, offering, mechanically, a specific solution for each of the endless occurrences in life, is evidently unreasonable, and would argue, in the person entertaining the expectation, a great misapprehension of the nature of a code, and indeed of jurisprudence itself. A code holding out such hopes would be found as delusive, as a medical guide-book professing to contain a specific remedy for every disease, without presupposing, in the person consulting it, a knowledge of the science and practice of medicine.

In the application of codes, just as in that of laws, to the solution of particular cases, difficulties must be expected to arise; but they will be met with less fre-

quently in the increase of order and system in the code. When, however, difficulties of that nature do occur, it will be for the understanding of the lawyers and the judges to clear them up, for the very reason that jurisprudence, even in its application to the affairs of life, has a reasonable and living nature, and not one that is mechanical.

In every important case, therefore, besides a code there would always be wanted the assistance of scientific lawyers, whose pecuniary interests consequently would not be narrowed by the change, and who would, moreover, have the advantage of a less toilsome study, and of an increase in their attachment to their honourable profession, at present rendered distasteful to many by the difficulty of entering satisfactorily and thoroughly into its spirit, as each individual, in pursuit of a knowledge of its fountains and its literature, must work anew the mass of materials of which it is composed, or rather by which it is encumbered. Every lawyer, conscientiously applying himself to his profession, must have often felt his endeavours restrained by this circumstance, or, at least, painfully retarded.

Thirdly: That great caution is doubtless necessary in the language of a code cannot be denied; but that it is not impossible to avoid the dangers specified in the third objection, we shall endeavour to prove at a later period, by showing the care that ought to be observed, as well in the choice of the individuals to whose learning the compilation of the code would have to be entrusted, as in the composition of the code itself.

As to the fourth objection: That the code would interfere with the study of the ancient fountains, which applies principally to the science of law; students could never,



for any length of time, lose sight of and neglect the importance of an accurate study of these fountains.

The question, nevertheless, as to the propriety of a code for each state, may be considered as resolving itself into this simple form: Whether it be not better, at least, to improve, although perfection cannot be at once attained, but must be reached by gradual approximations. But if, in the present favourable circumstances of England and America, the capacity for extracting the spirit of the laws be denied to the educated portion of the English and American people, or their classes of jurisconsults, it would not only reflect discredit upon these communities, but even present the incongruity of these nations with the ocular proof of their capacity furnished in the existence of many good laws, not being able to confide in the skill of their learned men, merely to digest those laws into a well-ordered system. Moreover, it is just this systematizing, or reducing to general principles, which is the irresistible tendency of the present times.

Jurisprudence must be handled with thought; it must be a system in itself, and can only, as such, have credit with civilized nations.

The sun and the planets have their laws, but they know them not; barbarians and savages are ruled by instinct, custom, feeling, but with no clear knowledge thereof; and it is only when jurisprudence is taken up, in its true spirit and with thought, and its purity ascertained by the light of reason, that it can be freed from the accidents of feeling, crudeness, selfishness, and be invested with its real precision, whereby impartial justice may be administered, and be made to acquire reverence in the eyes of the people.

It is a principle of universal application and of imperative necessity, that laws, carrying with them the obligation of obedience, ought first to be made known and be rendered intelligible to all men. The book of the laws, therefore, must be a book of easy comprehension to the people in general. Since the English language is sufficiently copious to express whatever ideas and terms English or Americans have need of, and since it is necessary in cases of importance that men should not only be able to know what their lawyers are talking about, but also the very words of the laws, without the necessity of being learned in a dead or foreign language, it must consequently be necessary that the laws be translated entirely into the English language. These same reasons, which we have mentioned with respect to the English laws, will apply with the same force to any other language which may be spoken by a sufficient number of people to pay the expense of publication, just as on the continent of Europe, the code Napoleon was translated into the languages of all those countries where it was introduced.

To hang up the laws on a high pillar, as Dionysius the tyrant did, so that no citizen could read them; or, which amounts to the same thing, to bury them under all the materials of learned books, customs, scattered statutes, and collections of decisions or conflicting judgments and opinions, so that a knowledge of jurisprudence can be attained by only a few of the people; such a state of things can in no wise be justified. Those governments which have given their people well-ordered and precise systems of laws, have not only been the greatest benefactors of those committed to their care,

but have, moreover, performed a great act of justice. Jurisprudence has for its object the development of rational freedom, the holiest and most noble of man's capabilities. It ought, therefore, to be made known to him, so much of it at least as may be intended to be binding on his actions.

If I may now consider these objections as refuted, and the necessity established of a systematic arrangement of the laws, in unison with the demands of modern times; or, in other words, the necessity of a code; it shall now be the object of my endeavours to set forth the manner in which such a code ought to be compiled, so as to render it most suitable to the ends of its establishment.

#### THE CODE.

A CODE should contain a system of leading principles, arranged in such order that the right mode for determining any particular case should be visible on the face of it, and be within the grasp of any person of scientific attainments.<sup>1</sup> A compilation of that kind would presuppose: I. with regard to the substance, a perfect comprehension of the leading fundamental principles of the laws as they then stood, always with reference to the relative weight of those principles themselves, and to the whole; consequently a perfect mastery of all the materials. The following remarks, bearing directly upon

<sup>1</sup> This opinion differs widely from that which would overcome an impossibility, and have a decision upon each case cut and dried: in other words, a material completeness.

the subject, have been taken from pages 23 and 24 of the report on the Codification of the Common Law of Massachusetts, 1837. "The general principles of law are often denominated, in the juridical language of continental Europe, emphatically as law—the application of those principles as jurisprudence." "The commissioners are of opinion, that it is expedient to reduce to a code those principles which are of daily use and familiar application to the common business of life, and the present state of property and personal rights and contracts, and which are now so far ascertained and established as to admit of a scientific form and arrangement, and are capable of being announced in distinct and determinate propositions."—

II. With regard to the form, a style so clear and intelligible as to call forth the same ideas in the mind of every person hearing the words of the laws.<sup>1</sup>

<sup>1</sup> That a style clear and precise, and an artless mode of expression, are requisites of paramount importance to good laws, is admirably expressed in the following words of Quintilian: "Prima sit virtus perspicuitas, rectus ordo, propria verba, nihil denique desit, neque superfluat; ita sermo et doctis probabilis et planus imperitis erit." Montesquieu has expressed himself in a similar strain (*De l'Esprit des Lois*, tome IV. livre 29, chapitre 16). "Ceux qui ont un génie assez étendu pour pouvoir donner des lois à leur nation ou à une autre, doivent faire de certaines attentions sur la manière de les former. Le style en doit être concis; les lois des douze tables sont un modèle de précision: les enfants les apprenaient par cœur. Les nouvelles de Justinian sont si diffuses qu'il fallait les abrégier. Le style des lois doit être simple. L'expression directe s'entend *toujours* mieux que l'expression réfléchie. Quand le style des lois est enflé, on ne les regarde que comme un ouvrage d'ostentation. Lorsque dans une loi, les exceptions, limitations, modifications, ne sont point néces-

The first step in the composition of a code will necessarily be to collect, with all care, the greatest amount possible of the materials of law; to divest them of everything obsolete; and, by discarding all the circumstances of their growth out of individual cases, to set them forth in the pure and broad garb of ideal or theoretical axioms.<sup>1</sup> The code itself should be composed, not so much with a view of creating a system of perfectly new laws, but rather for the purpose of extracting, from the given materials in law, the leading principles of the existing system, in general but precise terms. These principles must be seized in thought, and be made the basis whereon to conduct an inquiry into the internal connection and the nature of the relationship of these several principles with the great leading points of jurisprudence; and their true nature having now been fully ascertained, it will be possible to calculate, as it were, with these principles, in order to appreciate beforehand the probable results of any combination of them into a rule of action. This, doubtless, may be classed amongst the most difficult problems of the science, and will require investigations, not only into the gradual growth of these laws, but also into the history of those circumstances from which these laws originally sprang, and which the altered state of the times may no more allow to be sufficient grounds for the existence of those laws; as, for instance, in the provisions of the old English law for the imprisonment of debtors. The absurdity of seeing thousands of free citizens imprisoned, because of their

saires, il vaut beaucoup mieux n'en point mettre: de pareils détails jettent dans de nouveaux détails," &c.

<sup>1</sup> On this point much has already been done by the revisions.

inability to pay a few dollars, gradually led, in the United States, to the repeal of this law. The more humane laws of modern times punish only the fraudulent debtor, not honest poverty. In the room of these enactments, and of others of a similar nature, laws must be passed more in harmony with the relations of the day, more reasonable, and more in accordance with the spirit of jurisprudence. These changes ought not, however, to prejudice the vested rights of individuals, and where the public good nevertheless demands their sacrifice, compensation ought to be awarded according to an equitable standard.

From the above remarks, it may be collected that the end and intention of a code are to combine the principles of law, which are derived from history, into one system with the principles of law which are found in our reason, have been approved of by philosophy, and may be looked upon as the result of the high degree of civilization of modern times.

In the composition, therefore, of a comprehensive code, it will not be sufficient merely to work up the historical facts into a system, but the aid of a philosophical knowledge of civil and political life will also be required, as it is only when all the legal relations of external life have been regulated according to reason, that the long-enduring validity of a general code may be calculated upon. The philosophical consideration, moreover, of the historical development of jurisprudence will afford to lawyers, in the experience of past ages, valuable instructions as to what is necessary in law and what is merely incidental. In this manner a system of perfect law may be built up, approving itself as the beautiful and free expression of the internal life of a

people, proceeding out of its being, and enduring with its principles. And jurisprudence will have acquired from the code, by being reduced to the simplest and best-ordered form, its attributes of certainty, perspicuity, and method.

That a code must contain also the civil process, or the rules of legal procedure, and even the criminal law and procedure, will be assented to by all competent judges, without any further remarks.

The prosperous condition of the law must be ever dependent upon three grand requisites:

1st. Full and clear sources of the law.

2d. An able body of lawyers.<sup>1</sup>

3d. A suitable civil process.

As the first of these facts is the subject of the whole of the present essay, it will be unnecessary to treat it especially here.

In regard to the second, I quote from the "Commentaries" of Chancellor Kent, "On American Law," vol. I. part 2, of the Judicial Department: "The organization of the judiciary establishment has stood the test of experience, and has been so successful and beneficial in its operations, that the administration of justice has been constantly rising in influence and reputation." And this will always be the case if the judiciary department be kept independent, as well from the executive as from the people, by being appointed to hold their office during good behaviour. But if even the higher judges were elected for a short time, so as to produce a rotation

<sup>1</sup> Compare the above-mentioned "Report on the Codification of the Common Law of Massachusetts," page 26, §§ 3, 4.

in that department, then petty lawyers only would have the office, because the greater jurists would not accept it; justice would then become a party matter, and all true security of person and property be destroyed. Kent admires the English rule of appointing judges to hold their office during good behaviour; Prussia makes the judiciary power also independent of the king and people, by appointment for life, and removable for crime only.<sup>1</sup>

With respect to the third, as the law can only attain perfect efficiency by means of a good civil process, we now proceed to the consideration of this point.

The principles upon which the civil processes or procedure of these countries are founded, are suited to the nature of things, and may be carried through with strict consistency.

The obstructions to the establishment of a good civil procedure as well as want of despatch in suits, injure greatly the security of rights, consequently the value of those rights.

For this reason it is, that rights, on account of which suits have been instituted, lose greatly in value when the process or procedure is faulty; therefore credit depends considerably on the condition of the civil process.

A faulty civil process would deprive the best laws of effect, and even weaken the authority of legislation itself, because a regard for the laws is always diminished when they have not sufficient power and energy. For

<sup>1</sup> "Ceux qui ont dans leurs mains les lois pour gouverner les peuples doivent toujours se laisser gouverner eux-mêmes par les lois." Fénelon. See the speech of G. C. Verblank on the amendment of the law and the reform of the judiciary system in the state of New York, 1839.



malities are requisite both in the civil and criminal procedure, in so far as they conduce to the reasonable security of the liberty of the accused. But their excess must strike at the root of all good legislation. In the criminal laws, again, more than in any other portion of jurisprudence, the proof has been frequently furnished of the necessity of modifying according to the demands of the times. What an extraordinary contrast is to be found in the cruelties of the punishments of the middle ages and the earlier centuries, compared with the really christian mildness and reasonable severity of the present American penal laws, particularly in the penitentiaries of England and America, which truly do honour to both countries, by showing that they have not forgotten that the erring man was once a citizen, and, although in prison, is a human being capable of improvement.

ON THE NATURE OF A COMMITTEE IN EACH STATE, FOR  
THE PURPOSE OF FRAMING A CODE OF ITS LAWS.

IN order that a code may, above all things, possess those qualities so necessary to all systems, *unity* and *consistency*, the plan of the whole as well as its final wording must be the work of one individual, whose ideas and expressions may afterwards be examined and amended by others.

The greatest care must be used in the election of this individual, the president, and his coadjutors, for whose judicious choice the following remark may serve as a guide.<sup>1</sup> Without an historical and philosophical investi-

<sup>1</sup> Such an eligible president for instance would be Lord Brougham; for few lawyers are more profoundly imbued with the prin-

gation of the existing laws, it can hardly be expected that a good system of jurisprudence will be produced; so that it is greatly desirable that the president as well as the members of this committee shall possess, equally, an historical and philosophical turn of mind, but from the rareness of this twofold scientific disposition, the greater care ought to be taken to elect such men only as are distinguished, or at least that some of them should be familiar with the philosophy, and others with the history of jurisprudence.

In order to set forth still more clearly the importance of having the members of this body possessed of these qualifications, or at least distinguished for one or the other of them, I shall endeavour to expose, separately, the result of both.

With regard, in the first place, to the historical elements of positive law, Montesquieu, Savigny, and Thibaut have admirably laid down what ought to be looked upon as the true opinion. Montesquieu chiefly directs his remarks to the circumstance, that legislation itself and its particular rules ought not to be considered as isolated and abstract objects, but as subordinate parts of one whole, intimately connected with all those other regulations which make up the character of a nation and of a certain period, and which obtain through that connection their real meaning, as well as their justification.

Savigny's<sup>1</sup> remarks are of a similar tendency, and ciples of the common law; and England owes to his perseverance some of the most important improvements of her civil laws; I allude more especially to the changes that have been effected in the law of evidence.

<sup>1</sup> Savigny, on the Fitness of the present age for Legislation and Jurisprudence, page 45.

go to prove that this historical disposition is indispensable in legislation, in order to render it possible to seize distinctly the peculiar features of each period and of each law, and to view each idea and sentence in a living connection with the whole; that is to say, in the proportions which are alone natural and true.

A similar opinion is expressed by Thibaut, in the following words.<sup>1</sup> "The historico-philosophical jurist is undeniably the only one who can really solve a given problem; who can even discover that a problem has been propounded for closer inquiry. He is in possession of distinct and exactly developed ideas on the difference between the duties of compulsion and those of conscience, and on the nature of stern law and equity. He now opens his book of the law, and finds cases decided after the same principles, but nowhere those principles themselves; and decisions, not always in accordance with those principles. Here he discovers a problem—he questions history for a solution; if she is silent, he turns to his philosophy. Perhaps we should have decided according to our philosophy or our common sense, just in the same way as our forefathers and the Romans did. Why then not explain those decisions with the help of the same reasons, which will always make intelligent the decisions of common sense. It may also happen, on the other hand, that history offers means of interpretation; that perhaps an excessive bias toward lenity may be most naturally explained by an effeminate, overrefined, and overheated character of the people, or from other external circumstances. These remarks

<sup>1</sup> Thibaut, *Versuche über einzelne Theile der Theorie des Rechts*, vol. I, page 141.

serve only to show that philosophy and history can and ought to go hand in hand."

And is it, then, indeed possible to understand the present condition of an organic state of things which has not yet been sufficiently explained, without putting it in connection with its past history?

Out of that which once looked like law, there has proceeded the law which holds at present, and which is therefore only *what* it is and *as* it is, because the old, in the act of becoming obsolete, gave birth to the new. In the thousands of years that are past, the germ was contained for the legislation which now rules our conduct. The blossom must decay, that the fruit may be matured. But can we understand the production of the fruit, without going back from its existence to its origin, and from its origin to the first principles of its essence? It is only the ignoble spirit which stands gaping at what is, and sees no further, and will not see further, than that it is; but the *how?* and the *why?* have been reserved for the spirits of the better class only.

Confined to its own sphere, there is much merit in considering the beginning and the development of laws as they appear in the course of time; which is a purely historical labour, establishing the knowledge of their natural capacity; this is, however, very different from the philosophical consideration of law. For the development from historical foundations ought not to be confounded with the philosophical development from the idea; and the historical explanation ought not to be extended into a justification which is lawful in itself; because a point of law may prove itself necessary

under circumstances and times, and be perfectly well-founded and consecutive, and yet be in itself unreasonable and unlawful. Philosophically to establish points of law, means, to prove from the idea that they are reasonable and lawful in themselves. If this distinction is not observed, the point of view will be displaced, and the inquiry after the true justification, according to the idea of reason, be transformed into one of justification from circumstances and consequences, which latter may possibly rest upon false foundations; and, in a word, the external phenomena be put in the place of the nature of the thing. It happens, besides, that, if the external origin has been confounded with the origin from the idea, the historical justification unconsciously brings about just the very contrary of what is intended.

If the origin of any institution is found to be perfectly suitable and necessary with regard to particular conditions, and the institution itself just what the historical point of view requires, it follows, if this is to be reckoned a sufficient justification of the thing itself, that exactly the contrary has been proved; that, because those circumstances do no longer exist, the institution has lost its meaning and propriety. It is only for political reasons, because, among others, rights once acquired must be protected by the state, that their continuance can be justified, although their unfitness for modern times may not be denied.

Besides this historico-philosophical disposition, these men ought to possess discretion, and a firm and upright character, though free from obstinacy and selfishness, so that they may not allow themselves to be determined by paltry or egotistical motives.

This committee might, therefore, consist of, 1st, sitting, or retired members of the highest courts of justice, men qualified by their position and occupation to become imbued with a clear and thorough knowledge of the whole subject, and thereby enabled to estimate the importance of an individual case, and its relation to the system in general.

2d. The most distinguished theoretical jurists, who are deeply versed in the science of the law, and philosophers, whose scientific minds can alone make the given materials fruitful, by developing their principles and the system according to which they should be arranged.

3d. The most approved practical lawyers, elected from the members of the courts of law and the body of advocates, and who might be looked upon as representatives of the commonwealth, from their having had occasion to observe more closely the wants of the citizens, and to collect a great amount of special experience; but who ought, besides, to possess a comprehensive knowledge of jurisprudence, in order to secure their being able to furnish valuable results of experience.

It may with certainty be recommended, as relates to the qualifications of the learned fellow-labourers, that they ought to be not only versed in the English or American law, but also in the Roman jurisprudence, and the philosophy of the science, because the American law sprang from the old English law, has derived many improvements in the last fifty years from the Roman code, and now requires a philosophical system and a precise definition of its principles. The same may be said of the present English law.

At this place the remark will be highly satisfactory,

that the ready zeal and the recent labours for the philosophy of law have already done much for the law, so that the moderns have acquired essential advantages over the ancients, and are capable of producing, in the sphere of legislation, works which may far surpass those of their forefathers.

Let great care be shown in the election of the members of this committee; for here it is not numbers, but talents, which obtain the palm.

We can, on no account, dispense with the good advice of our contemporaries and predecessors. That of the latter is contained in the sources of the law. That of the former is the collective wisdom of the great men throughout Great Britain or the Union. And it must be manifestly desirable, not only from the power arising from the unity of the United States and the intricacies springing from the internal communication between the different states, but also from the circumstance that one state may not possess, in the resources of its own jurisconsults, statesmen, and philosophers, a sufficiency of means for creating a perfect system of civil jurisprudence; that the code for each state should be compiled by the joint labours of the most eminent men of all the states of the Union.<sup>1</sup> The members of such a deliberative body might be appointed in England by Her Majesty the Queen, and in the Union by the governor and senate of each state, in the same manner as the officers in the judiciary department of the United States are appointed by the pre-

<sup>1</sup> In England, France, and Germany, the people elect the members of their general legislative bodies indiscriminately from all districts of the country, and are not, as in the United States, confined to those residing in their own district.

sident and senate, with these exceptions, that each state shall have the right of electing from another state any celebrated literary or scientific man, who might appear to them peculiarly fitted for this great business, and in order the more to guard against the effect of party spirit, I would propose that a convention for the nomination of candidates be composed of an equal number from each profession; for those persons best fitted for such an office generally have too much reservedness of manner, and have too little regard to popularity, to secure an election by universal suffrage. The debates in the senates of the different states, concerning the men to be appointed, should be public, because then we shall also be able to distinguish the great minds, who will be zealous in their support of the worthy, whereas little minds will discover themselves by their envy and jealousy. By these deliberative bodies we should make the laws more reasonable, therefore more permanent and lasting. And the less of passion and party spirit, in this proposed committee or body of commissioners, the greater would be the weight of argument and knowledge of its thorough lawyers, statesmen, and philosophers, and thus a remedy be provided against the serious evil which Kent mentions in his Commentaries on American Law, vol. I. p. 227:—  
“A mutable legislation is attended with a formidable train of mischiefs to the community. It weakens the force, and increases the intricacy of the law, hurts credit, lessens the value of property, and it is an infirmity very incident to a republican establishment, and has been a constant source of anxiety and concern to their most enlightened admirers. A disposition to multiply and to change laws upon the spur of the occasion, and to be



making constant and restless experiments with the statute code, seems to be the natural disease of popular assemblies. In order, therefore, to counteract such a dangerous propensity, and to maintain a due portion of confidence in the government, and to insure its safety and character at home and abroad, it is requisite that another body of men (the senate of the United States), coming likewise from the people, and equally responsible for their conduct, but resting on a more permanent basis, and constituted with stronger inducements to moderation in debate and to tenacity of purpose, should be placed as a check upon the intemperance of the more popular department."

The codification should be entrusted to a union of lawyers, under the direction of a president, and not to a single individual, because the knowledge and experience, required for the suitable composition of the laws in the various departments of jurisprudence, are more extensive than could possibly be united in one man, whilst their numbers would excite a more thorough examination and discussion, and prevent an obstinate adherence to extremes. A spirit of circumspection and a perfect knowledge of the extent of the subject which is to be entrusted to their skill, must guide the committee or body of commissioners, if its usefulness is to be certain and efficient.

The number of members in this committee should be suited to the sphere of its activity.

Its president should be entrusted with the drawing up of a plan for the whole subject, the management of the future discussions, and the final composition. It may be expected that the committee itself would transfer

the conduct of affairs to the ablest of their body, so that probably the most sagacious and talented men would be the soul of this committee.

#### METHOD OF COMPILATION.

THE president, having, as aforesaid, the design and management of the whole under his charge, ought to prepare, after a simple and perspicuous plan, a draft of all the subjects that are to be discussed.

From this draft, each member would select those subjects most suited to his previous acquirements. Each would then give in his productions, in the exact style which they ought to have, if they were to be published. And moreover, though only for scientific purposes, an historical enumeration of all the fountains, and as perfect an account as possible, of the literature he had examined, with accurate quotations in order to keep the sources accessible; all which might be embodied in the form of notes beneath the text of the code. In this way the mass of the materials would be thoroughly and perfectly digested. In order not to lose sight of the necessary unity, these productions ought to be read aloud in the presence of all the members, and each should pay strict attention to prevent any contradictions in the individual works. Partially or entirely unsuccessful productions should be prepared anew; in which latter case, several individuals might draw up the same each by himself, whereupon their drafts might be compared in session, be improved by selections from each, and by verbal and written amendments, and be united into one lucid whole.

It has been always observed in the verbal transactions of assemblies, as for instance, in parliament or congress, that many able men are frequently prevented from speaking by timidity or other causes more respectable, although they may be in possession of the soundest views. The amount of their knowledge and experience is here almost withdrawn from the deliberations, and does not increase, in the degree in which it might and should, the maturity of the measures which may be finally adopted. In order to meet this evil, the members of the proposed committee ought to be permitted and encouraged to hand in written amendments, which probably would here be frequently offered, because solidity would be more esteemed than pompous delivery.

The publicity of these sessions seems to be necessary, in order that, on the one hand, a lively interest and a perfect confidence may be maintained among the people, from the conviction that the debates upon the civil jurisprudence are open to criticism, and that shame, that great protector of human liberty and the instrument by which publicity works with such irresistible power, would be a check upon the selfishness, or obstinacy, or ignorance of the members;—and in order, that, on the other hand, those jurists who do not sit in this committee may be prepared, by an attendance at these sessions, for future legislative activity.

The minutes of the proceedings ought, besides, to be made known through the press, so that the nature and origin of the new code may be well understood, and an historical and literary interest, which would else be wanting, be impressed upon jurisprudence.

And finally, all thoughts should be laid aside of wish-

ing to finish so difficult a task in a few years; there is no reason for haste, and nothing did more injury to Justinian's code than the excessive precipitation with which it was compiled.

From this first attempt, some perfection ought certainly to be expected, though not the highest. There has never yet been established, in any state, a single institution which offered at once the highest degree of perfection. How much less can such be expected at the first attempt at a system of legislation, which is to embrace the whole *jus privatum*, or municipal law of a state.

The whole English and American jurisprudence would acquire, from each good code, advantages similar to and even greater than those which Blackstone procured by his work for the English law, which, before his time, was nearly incapable of being understood as a science, even though his work was not sanctioned by legal authority. But would any body seriously maintain that it had been better if Blackstone had not spread so much light and so many facilities over this intricate subject? To such facilities the code would superadd the influence of its legal authority, whilst anything faulty that might be found in it would be gradually amended by the codifying committee whose functions ought to continue, even after the completion of the code, as shall be more particularly dwelt upon in its proper place; and as there would be less business, there would be a proportionably less number retained.

After a code has received its final revision by the committee, it will have to be printed and circulated throughout the country, in order to induce all thinking men to express, in the public papers, or by private

letters, any doubts or objections which they may entertain. For it is due to the dignity of those countries where law and liberty are respected, to consult with the people about the regulations by which they are to be bound; and the more so as, by one unwise law, the happiness of a country may be disturbed.

Sufficient time having been granted to public opinion to express itself openly, before the final publication of the code, and the well-founded objections having been weighed and attended to by the committee, the code would then be laid before the legislature of its state, for the ultimate scrutiny and ratification, where those wishes of the people, which might hitherto have been disregarded, and should approve themselves of weight, could obtain a hearing and a certain admission into the code. Whatever was introduced in this present stage, and might disturb the unity of the whole, ought to be introduced as an exception, and be designated as such.

#### OF THE NECESSITY OF A PERMANENT COMMITTEE FOR THE PURPOSE OF CONTINUALLY SYSTEMATIZING THE LAWS:

THUS, finally, the code will have been digested. But we may not even then forget that the law necessarily advances with man in the form of customs and statutes, in the way we have attempted to develop more at large in the preceding pages; and that its meaning, which we described elsewhere as the reasonable at a certain stage of development, contains within itself the necessity of a continual progress, or retrogression.

What ought to be done at this point, with a full regard to the nature of law, can be alone determined from

the pages of history; from which we learn, that the civil jurisprudence of the Romans owed its circumspect expansion, and a perfection that has never again been attained in any country, to the carefully united action of legislation and jurisprudence, which went on together with an equal step, and to the intimate alliance of theory and practice. The unparalleled development of the Roman civil jurisprudence rested mainly upon the ever united action of the prætors as administrators of the law in their edict, and of the Roman lawyers as representatives of the jurisprudence. The office of the prætor *urbanus* and *peregrinus* in Rome, and the edicts which they promulgated for the period of their term of office, one year, included within their objects the civil process and the whole civil jurisprudence. This system of edicts cannot be traced, in its origin, to any actual and real legislation, which from the very beginning had ever been an affair of the people, promulgated by its various legislative bodies;<sup>1</sup> but consisted in a declaration of the principles by which the prætor intended to be guided in the execution of his duties, and which acquired, in the following manner, its legal authority.

After Rome had extended her dominions over the greater part of the then known world, the relations of her citizens among themselves and with foreigners had become continually more intricate and varied, and new manners and customs had been introduced, the prætors were led—not, indeed, from any fixed plan, but rather from the necessity which lay in the altered state of the times and the enlarged circle of communication—to alter and

<sup>1</sup> Thus the senate promulgated the *senatus consulta*, and the plebeians in their comitia, the *plebiscita*.

continually to amend the regulations of the civil law, always, however, with regard to the spirit of the times. In the expansion of the law, nevertheless, the prætors were forced, by the disposition of the Roman jurists—which strongly held to all that had descended from former time—to keep always before their eyes the leading fundamental principles of the then existing law, and not to hurt or destroy any portion of it by violence. The intention of the edict, according to the Roman expression, was *adjuvare, supplere, et corrigere*.<sup>1</sup> In this system of perfecting the law, those principles which had approved themselves as sound were invariably retained as guiding points, around which the new and necessary laws were arranged as supplementary. Hence a certain unity and sequence were necessarily introduced into the law by this procedure.

Doubts may, however, be raised as to the intrinsic merits of those ancient fundamental law-principles; to which the obvious answer is, that they were good, at least, according to Roman views. More cannot be demanded from any practical system of jurisprudence, than its harmony with the degree of the expanded reason of that time, and never an absolute perfection; that is to say, a divine, and not a human perfection.

That the ancient fundamental law-principles, which the prætors regarded as the foundation of the whole Roman jurisprudence, were sound, at least, according to Roman notions, I shall endeavour to show in the following few remarks. The leading fundamental principles of the Roman jurisprudence were contained in the twelve tables,

<sup>1</sup> Dig. lib. 1. tit. 1. l. 7.

of which we unhappily possess only a few mutilated fragments, which have been handed down to us by different authors, so that it is impossible to judge fully of their internal merits.<sup>1</sup>

With the history of their birth, on the other hand, we are better acquainted, and know that the first ten tables were drawn up, during the first decemvirate, by patricians alone. Although plebeians composed the half

<sup>1</sup> The principal genuine fragments of them are found in Cicero's works, particularly in "*De legibus*," in the writings of the older Pliny, in Gaius's writings on the twelve tables: Gaii Inst. I. §§ 111. 122. 132. 145. 155. 157. II. §§ 42. 45. 47. 49. 54. 64. 224. III. §§ 9. 11. 17-19. 21. 23. 40. 46. 49. 51. 78. 82. 189. 190-194. 223. IV. §§ 11. 21. 24. 28. 76. 79. Gaius, in his commentaries on the twelve tables, wrote, not twelve, but six books, and it seems that two of those tables always belong together, according to the opinion of Prof. Dirksen, of Berlin, in the "*Corpus juris civilis*," pr. ex. lex. 1., Dig. de orig. jur. lib. 1. tit. 2, and lex. 43., Dig. ad leg. Jul. de adult. lib. 48. tit. 5; in the works of Gellius and Festus. Among the attempts to restore the twelve tables to their original order, from the fragments, those of Jacob Gothofred, in his "*Quatuor fontes*," Genev. 1653, pp. 1-264, and the other attempt of Prof. Dirksen, at Berlin, in his "*Uebersicht der Versuche zur Kritik und Herstellung der Zwölf-Tafel-Gesetze*," Leipzig, 1824, are the most eminent. The great difference in the results of these attempts shows the impossibility of fully effecting that object. For farther reference, I would mention the following works upon the subject: Haubold, Inst. Lit. pp. 304-306; Loccella, *Tria tentamina ad illustr. leg. XII tabul.* Vien. 1754; *Leggi delle dodici tavole esaminate secondo i fundamenti e le regole della politica* da Ludovico Valeriani. Mil. 1802. Zell, *Leg. XII tab. frag. cum variar. lect. delectu paraph. et indicatis sing. frag. fontibus*, Freiburg, 1826. Schirmer *de tribunicia pot. origine ejusque ad XII tab. leges frag.* Comm. 1826. Hugo *civil. Magazin*, vol. IV. p. 462. Savigny's *Zeitschrift*, vol. I. numb. XVII. Niebuhr's *Rom. History*, I. pp. 46, 67, 107, and II. p. 109. *Fragmenta XII tabl. ex restitut. Jac. Gothofredi notis illustrata* a Ch. Hoffmann in *Historia jur. Rom.* vol. II. part 1. pp. 129-304.



of the second decemvirate which promulgated the two last tables, it cannot have been very difficult to obtain their consent to any measures supported by the firm and united patricians; as it was only necessary to win over one of the plebeians, in a college where every thing was decided by the majority, and where the equality of the new men (*novi homines*) could with difficulty be insisted on, with those who had filled the highest offices, the more so, as publicity was not allowed, which might have furnished them with the force of public opinion. The first foundation, however, and the direction of the whole work, originated entirely with the patricians.

But it was the common law of the different classes and of the whole people, which was to be laid down in the code; and as this was done first by the members alone, and afterwards with the superior weight of one class, it seemed hardly possible not to expect great partiality; and indeed the old privileges of the patricians were rather secured by these writings than reformed; yet we may with certainty conclude that the fundamental principles, as regards the civil law, laid down in the code, must have been suited to the peculiar spirit of the Roman people, since we find that people assenting to and retaining the twelve tables, although they banished the authors of them. It is moreover worthy of notice, that Cicero, Tacitus, and Livy, who were acquainted with their contents, judged most favourably of their merits.<sup>1</sup> The precise brevity of their general principles may be concluded from the circumstance of Cicero's having

<sup>1</sup> Cicero de Orat. 1. 44. Fremant omnes licet, dicam quod sentio : bibliothecas mehercule omnium philosophorum unus mihi

learned them by heart, in early youth;<sup>1</sup> and it is this precise brevity which probably assisted most materially in establishing the twelve tables as the proper and general foundation of jurisprudence.

The prætors were mindful of the twelve tables, and were assiduous in protecting ancient customs, without, however, looking upon them as invincible barriers to the establishment of any new views which might have sprung up among the people.

The edict owed a great part of its beneficial action to the practice, invariably observed by the prætors, of laying down in it beforehand the principles by which they intended to be guided, so that sudden and arbitrary decisions were rendered difficult of introduction into this growing system of laws; whilst, on the other hand, those principles were regarded as laws on trial for the space of a year (*leges annuæ*, as Cicero describes them), which the succeeding prætor might retain, if he found them of good import, or reject, if otherwise. If, in this way, the principles were established into enduring laws (*edictum translatitium*), from the succeeding prætors having approved and acted upon them, and from their having been silently accepted by the jurists, they could not—from the general position of the prætors, whose edicts and proceedings were subjected to public criticism in the public courts—but be the result of the opinions of equitable and justly reasoning men,

videtur XII tabb. tabellus, si quis legum fontes et capita videri, et auctoritatis pondere et utilitatis ubertate superare, etc. De republ. II. 37. Tacitus An. III. 27. and Livy III. 34.

<sup>1</sup> Cicero de legibus, lib. II.

and must have been suited to the reigning opinions and the demands of that particular period.

In that manner the edicts, proceeding from small beginnings, grew into a completeness which embraced nearly the whole system of jurisprudence.

This constant working at the several parts of the Roman jurisprudence, which advanced with such caution and such invariable regard to the leading fundamental principles; the precise and clearly defined character of these principles, which gave such an enviable and thorough command over these materials to the great jurisconsults of the second and third centuries after Christ, so that they were able to calculate, as it were, with principles, and to handle theory and practice with equal facility, and thus raise the Roman jurisprudence to its most brilliant epoch,—in short, that perfection of the law at this glorious period of its prime, which fills us with such admiration, seems to have been chiefly owing to that peculiar legislative activity of the prætors as well as to the co-operating and influencing activity of the jurisconsults.

The manner in which the prætors amended the laws was influenced and restrained by the jurists, as the guardians of the ancient forms of the law; whilst the characteristic disposition of the later jurists, which was so favourable to the organic development of jurisprudence, seems to have been principally formed and preserved by the carefully progressing edict. The edict of the prætors, therefore, justly deserves, from its great efficiency, this beautiful denomination—

•

"Viva vox juris civilis."<sup>1</sup>

From the period of the later Roman emperors until our own times, there has never been such a union between legislation and jurisprudence, nor did there exist throughout those many centuries so well regulated a system for continually improving the jurisprudence, so that a considerable period frequently elapsed during which little was done for the law, and then some sudden legislative act appeared, and too much was done. The one was as hurtful as the other. For nature will not endure stops and jumps, nor will the life and the law of man endure them, for both are subject to general laws of nature. But everything contrary to nature must necessarily produce injurious consequences from the invariable laws of nature. Hence it was, from an internal necessity, that the above described faulty condition of the laws arose. From history, on the other hand, we learn that the law, which, from its nature, is ever growing, can only be maintained for the future in a healthy life and condition, by the reciprocal assistance derived from the union of the science of law with the making of law. It will not, therefore, excite surprise, if I take upon myself to point out the means of bringing about a good condition of the law from the existing relations of the states.

It has already been said, that a permanency ought to be given to the influence of this mentioned committee and accordingly I would now propose, that of those who have been engaged in the compilation of a code, a smaller

<sup>1</sup> Dig. I. lib. 1. tit. 1. l. S.

number should be retained for the exclusive purpose of adjusting, controlling, and providing for, as circumstances may require, the development of the law (always under the final superintendence of the different states and their legislative assemblies). This body should, moreover, be especially empowered (for settling controversies and removing defects in the new code, and also in the law continually evolved) to prepare, revise, and arrange yearly the new statutes for the legislatures, so as to assume additions or supplements into the code, and to give greater certainty to everything found good in the common law. From time to time, therefore, newly systematized editions of the code will be necessary. As, however, precedent holds so important a place in determining and establishing laws, and as precedent depends upon judicial decisions, it should be required of all judges who may determine in cases of difficulty, to send in their decisions, and the reasons for them, to the proposed committee, to be by them digested and provided for in future, by the authority of the legislature. In this way only will unity of system be secured; for, otherwise, there would be two sources of laws—the legislature and the courts. In the plan now offered, both are united and properly influenced through this scientific medium, by which both communicate with one another, and which, from its nature and office, can give more freedom and leisure of mind for the comprehensive labour of controlling and digesting the whole system of law. And every citizen should be allowed to address remonstrances upon those points which appear hurtful and faulty, in the same way as the right of petition allows each citizen to present

petitions to the legislature. For the most comprehensive investigation of individual points is, it is well known, brought about by real cases, from the urgent necessity of carefully considering such cases from all sides. The committee ought in no wise to rest satisfied with the partial representation made by judges and private individuals, but should look into the matter at issue, and obtain, by inquiries and reports, the means of thoroughly sifting the doubtful questions. In this way, every citizen would have an opportunity, and might reasonably hope to do something towards the further improvement of these great national works.

At the same time, it would be of the highest importance for the lawyers of those states, that thereafter they would have but one and the same object for their scientific labours, and could mutually assist each other, by public communications of their experience in advancing the law towards its highest stage of perfection.

All that has been said in the preceding pages on the committee for the first compilation of the code, applies with equal force to the permanent committee, which will realize the ends of its establishment in continually promoting and amending the municipal law. The following remarks will include everything of an especial reference to the permanent committee.

This committee should stand under the direct control of its state, be annually called together, continue in session for some precise period, and receive a suitable and fixed salary from the public treasury; their salary would be but a trifle, compared with the benefit derived from the clearness and perspicuity introduced into the

law; and would, probably, from its constitution, be able to prepare most thoroughly the laws for the after deliberations of the legislature of its state.

By the action of this permanent committee, the unity of the jurisprudence would for ever remain unimpaired, because the leading fundamental principles of the law of all the states were originally drawn from the fountains of the common law, and might be easily preserved and united, after having been once clearly and systematically laid down, in the several state codes. If the true value of the Roman jurisprudence is rightly supposed to consist in the facility with which the Roman jurists turned from theory to practice and from practice to theory, we may hope to procure for our legal development the same peculiarities and the same stirring life, so soon as the above committee, constituted after the proposed plan, shall have acted a sufficient length of time. For in the same way as the Roman law and the edicts at the time of the great jurists owed their unequalled perfection to the circumstance, that the jurists at Rome possessed a common centre in the publicity of the law-courts and in the practical spirit engendered by the annual changes of the prætors, who were elected from among themselves, and that they possessed, as the result of both, a lasting means of applying their science to the sphere of legislation or of practice, so in these present times, a new life might be infused into the development of English or American jurisprudence by the establishment of such a committee, which would render it possible to treat the science more practically, and the practice more scientifically. In this way, the jurists would indeed obtain a well-founded

science of law, while distinguished and talented men would apply themselves with heart and soul to the study of jurisprudence, because their vocation would be rich in really scientific and practical investigations, and be highly salutary to the whole state.

Committees of this nature ought to be permanently engaged with the civil jurisprudence; and, in order that the whole body of the law may at all times be easily controlled, should provide for the proper and systematic ordering and intermingling of ancient and modern laws, together with a constant and exact account of all the changes which may have been effected in the ancient system by modern innovations. In this way, besides the essential points of an amendment of the positive law, attention might be safely bestowed on that great desire after more easy means of mastering the law, which had shown itself in so many places, and was one of the chief causes of the demand after new and well-ordered codes. These would be the beneficial effects of the adoption of this plan, which would not only apply to these present times, but extend also their influence throughout future centuries, and materially assist the foundation of the fortunes of the states.

If, on the other hand, it should be maintained that no attempts should be made at amending the condition of the law by the lasting union of jurisprudence and legislation, which would advance the law to a high degree of excellence, until jurisprudence and legislation had each attained their highest perfection, it would signify about as much as that a person ought not to go into the water until he is able to swim.



A more important objection to my plan might seem to be contained in the following argument; which, however, on impartial investigation, will be found of little weight.

Among other privileges, it is well known that the change of the municipal law, *jus privatum*, has been reserved to the legislatures of the different states. This change is not only one of their duties, but also one of their rights. It might now appear, that this right would be encroached upon by my proposition, but this is far from being my intention, and I am only anxious to see the committee, which I have proposed, take the place of those committees, which are generally appointed for the purpose of preparing the drafts of laws, and assume first the compilation of a code, and afterwards the continued amendment and advancement of the municipal law. The labours of this committee would likewise serve only as preliminaries for the good of the legislatures, on whose deliberations and decisions it would depend, whether and with what modifications their labours should be assented to. This I have already in part adverted to, when I remarked that the composition and adoption of a code would mainly depend upon the free will of the state legislatures.

The constitution of the proposed committee, which, according to this plan, should be permanently engaged with the healthy development of the law, would produce the beneficial effect of preventing that hurtful stagnation and too rapid alteration which have hitherto marked the advancement of legislation. This great advantage, it is manifest, cannot be attained by committees of the legislatures appointed for separate ques-

tions, for the very simple reason that those committees are not permanently engaged after a fixed plan, but only on separate detached points, and that they do not always consist of the best lawyers and scientific men.

This more favourable form of the proposed body, however, must be animated by a vigorous and keen spirit, to ensure which I was induced, in some of the preceding pages, to dwell on the kind of men, who ought to be assembled in order to perform satisfactorily one of the most holy duties of the people.

The legislatures, whose interest it would manifestly be to stand in the same relations with the committee, which had already subsisted between them and the usual committees on the law, and whose right, with regard to the drawing up of the propositions for the code and law, ought not to be diminished in any way, should have the privilege of electing the members of this committee, as before mentioned.

The influence which the legislatures have hitherto exerted, would thus continue undiminished, while the exercise of only one of their rights with regard to legislation in the sphere of the municipal law would be regulated more usefully for themselves and with more salutary effect for the nature of the law.

The efficacy and the rights of the legislatures, in questions of administration and state polity, as well as their other immunities, would continue unchanged, since it would be nothing more than the preparation for legislation in the sphere of the municipal law, which ought to be transferred to the committee.

I said, that the operations of the committee would be useful to the legislatures themselves; the proof of this

assertion may be demanded of me, and I shall hope to establish it by the following argument.

A legislature must not and ought not to be composed of lawyers alone. Solid legal acquirements, however, are required for the certain and perfect disposal of questions appertaining to jurisprudence. Many of the nonjurists are frequently embarrassed about voting according to their conscience, even with yes or no, upon purely legal points, as they are unable fully to judge of the purport and entire meaning of those questions.

If now a legislature is to be really effective, as regards the whole law, it must be presupposed that all its members are thoroughly versed in the doctrines of jurisprudence, and their historical development; this, however, can never be the case with the legislatures, from their peculiar and very dissimilar mode of construction. For this reason, no certain expansion and perfection of the law can be expected through their means alone.

The questions, moreover, relating to the administration of the country, crowd so upon another, and from their pressing nature demand so imperatively the action and attention of the legislatures, that the examination of purely legal questions must often be put off, from one session to another, unless the legislatures were retained together for a longer period, so as to afford the necessary time for their discussion and decision.

But the members have seldom been able to devote the whole of their time to legislation alone, and have generally had other affairs to attend to, so that, after the despatch of the most important points, they have ever willingly deferred the purely legal matters.

If, now, the legislatures get the drafts for those legal matters thoroughly prepared by the proposed committees, their future deliberations upon them would be sooner matured, and offer at the same time the great advantages, that partiality would in a great measure be avoided, and that the wishes of the people would more certainly be introduced into those drafts.

The proposed committee would be, in a word, nothing more than a union of learned men for the attainment of a great scientific object, and, as such, should not have any legal authority, except the authority of its arguments and of truth. The legal authority, or the power of making into laws the previous labours of this committee, ought to remain unchanged and undiminished in the hands of the legislatures. It would thus happen, that jurisprudence and legislative authority would be united peaceably and firmly, and mutually assist each other.

This co-operation would be salutary, peaceful, and harmonious, and each part would gain additional strength from the union; jurisprudence alone, and left in the position it has hitherto occupied, is seldom able to introduce its truths into practical life, without this internal connection with the legislative authority. The latter, on the other hand, obtains great advantages from the assistance of jurisprudence, from its thoroughly digested drafts. Its true interests and its popularity depend greatly upon the finished perfection of its enactments; so that it will readily seek the support of jurisprudence.

In this way, each separate state might have such a committee besides its own legislature. In order, however, that the power of the learned might not be too

much dissipated, and that, in the development of the law of all the states, that so desirable harmony might in part be attained, their separate committees should be put in connection with one another by the communication of their labours. As this might be effected by means of the press, there would be no great difficulties to be surmounted; and as the fundamental principles of the laws of all the states have originally flowed from the same fountains, the general development of jurisprudence, in harmony with the main points at least, would not be of such difficult attainment as might be supposed by those who are ignorant of their historical elements.

Not many will be found to deny the good results of such a co-operation of theory and practice, of such an union of jurisprudence and legislation. Obstructions and difficulties, notwithstanding, will be offered to its execution; these, however, in so far as they have been examined, do not exclude the possibility of being overcome.

#### ON A GENERAL CODE.

IN the United States, the diversities of climate, local relations, and institutions, must necessarily modify the particular laws of the codes of the several states of the Union. But in consequence of the great intercourse between the different states, and their connection in such a variety of relations, upon which their rise and progress depend more than on foreign relations, laws of commerce, in order not to create difficulties and derangements, and injure their intercourse and credit, ought to be uniform. To this effect there might be a

general code, on the same plan as that of the states, for the purpose of arranging the laws on those subjects, whose jurisdiction was granted to the general government by the constitution, art. 1. sec. 8. The remarks of judge Story, in his Commentaries on the Conflict of Laws, will fully prove the utility of such an arrangement, and I would request every reader to give this work an attentive perusal, for in this essay I can do no more than to give some hints of the principal subjects. Since, as it is well known, all the states were first governed by English law, the bases of the different codes will all be similar and like pillars to the Union, and the general code will be the keystone to the structure. The same may be said of a general code of the United Kingdom of Great Britain and Ireland. Thus we shall have a practical realization of the maxim, "One empire, one law," and thereby draw still closer the connecting bonds of love for a common country.

#### HISTORICAL REMARKS CONCERNING THE FORMATION OF DIFFERENT CODES.

THE opposers of these codes have attempted to predict, from their history and the errors which have attended those early attempts to systematize the law, that all future experiments of the kind will not be more successful. But these predictions are vain, unless it is proved that these experiments are contrary to the very nature of the law. But none of the opposers of codes have been able to prove, from the nature and spirit of the law, that it could not be comprehended

in a systematic arrangement. And it would truly be very remarkable, if the law, which is itself destined to produce civil order, could not be conceived and expressed in any order. But opposers do not go so far as to assert this; their objections amount to this, that the spirit and connection of the law can very easily be marred in bringing it from its confused and disordered state to a regular, systematic form.

That, in this respect, great danger is to be apprehended, if such a work is too much hastened, or if entrusted to unskilful hands, is not to be denied, for the history of these codes too plainly shows it; but from that very history, it can also be shown that those errors can be avoided in new experiments, for it shows us particularly on this point, just what it does in general in regard to practical life—it teaches us more what faults we ought to avoid, than how we ought to make new experiments under the various circumstances and with different persons, rather leaving this to calculation. With the exception of the minor faults, there appear to be two great mistakes with regard to the treatment of the codes and the state of the law after their promulgation, which have prevented a more happy result. These are, 1st, nearly all former codes were compiled too hastily; and, 2dly, after their publication, they have been left too much to their own fate. Instead of which, this same body of men who compiled them should have been retained to defend them, and to harmonize them with the newly-made statutes and other difficulties. The fact of the first mistake will be seen from the historical remarks in some of the following

pages. And that of the second also will be found in the following, together with the preceding chapters.

Here I would recall to the reader this general observation. In order that the state of the law in a country may be good, two things are necessary: a perfect science of law, and good legislation. Neither can attain the highest degree of perfection without the co-operating excellence of the other, since each in its progress depends upon the assistance and material of the other. It is necessary for a good state of law, that the influence of both should be contemporary and united. The truth of this principle, as shown above, has been proved in the development of the Roman law. I would here remind my readers, that the unequalled development of that law depended essentially upon the continually co-operating exertions of the prætors as legislators in their edict, and of the Roman jurists as representatives of the science of the law.

Now, from the time of the Roman emperors to the present day, such a co-operation of legislation and of the science of the law agreeable to its nature has not existed, in any state; hence often too little was done for a time, and then, again, too much at once, by hasty acts of legislation. The one extreme was as detrimental as the other; for nature in general, and consequently the nature of the law, cannot endure this irregular progress; everything contrary to nature punishes itself.

I have sufficiently shown what co-operation should exist between legislation and the science of law, in what I have said in the previous chapter, concerning the development of law after its promulgation. I now proceed to the history of the codes themselves. There are four



of these, which stand eminent in the history of law in both the older and more modern European states, as the most elaborate and remarkable; namely, those of Rome, of Prussia, of Austria, and of France, which are particularly excellent for examples to us, since they are all comprehensive codes, and made for great realms; since the manner of their compilation has been very different; and, since the state of jurisprudence from which they emanated had great similarities and also dissimilarities. In considering these, I shall speak of them in the chronological order of their promulgation. First, I speak of the Roman code, the *Corpus juris civilis*.

#### THE ROMAN CODE.

PREVIOUS to the compilation of the Roman law in its present form, by Justinian, the clear head of Julius Cæsar had originated the idea of a general code, which, with the hand of a true artist, he would have modelled as the purest monument of justice, had it not been for the death-blows of Brutus and Cassius. As we have remarked, the present Roman code owes its existence to the emperor Justinian. In order to estimate justly its merits and defects, we must briefly represent to ourselves the state of jurisprudence at that time.

Their most eminent jurists lived about the commencement of the third century after Christ, and jurisprudence was then at its highest point of cultivation. The writings of these eminent men had been carefully preserved, and from them the law was continually extracted. But from the end of the third century to the reign of Justinian, 527—565, was a time of gradual decline; at

this time the sources of the law consisted in classic writings and the almost innumerable constitutions of the emperors. Since these materials could no longer be controlled and governed, there arose, previous to that of Justinian, several compilations, as, the Perpetual Edict, compiled by Salvius Julianus, and the *Codex Gregorianus*, *Hermogenianus*, and *Theodosianus*. The use only of the imperial constitutions had been rendered more easy by the latter three compilations; but the jurisprudence depended much more upon the writings of the jurists; and to procure all of these at that time without the art of printing was very difficult, and even for the majority of lawyers impossible. Then Justinian ordered his compilation, and it, as the first, contained the whole of the then practical Roman law, in that point far surpassing all previous compilations.

Justinian, in his compilation, did not intend to originate, but only to arrange the law in better form, externally. The principal matter arranged was the constitutions of the emperors and the writings of the jurists. The former were collected in that part of the code called *Codex* and *Novellæ*; the latter in that part called *Digestæ*, or *Pandectæ*,—the *Institutiones* composing the introduction to the whole work. The *Corpus Juris* consists of four parts: I. *Institutiones*; II. *Digesta*; III. *Codex*; IV. *Novellæ*.

This arrangement of the law according to its sources, retaining the original language, has been very important in preserving the true Roman law. For in this arrangement we can very easily separate the better principles of the law contained in the digests from the generally less valuable principles of the imperial constitutions.

The digests arranged in the following order the writings of the jurists: I. On the civil law, properly so called; II. On the edict of the prætors; and, III. On the practice of the law.<sup>1</sup>

The writings of thirty-nine jurists, contained in two thousand volumes, are here reduced and combined into one.

The object of the compilation was the practical law; the useless portion being thrown away, and the whole historical development being retained for the better application of the principles, since all practical law has been given historically. This constitutes the superiority of that code above all others. There had been collected all the best manuscripts of that time, and a prudent and wise selection had been made, which preserved the true spirit and character of the Roman law. Thus a consistent and complete system of real legal principles, derived from the various sources, without injury to the intent of the originals, was arranged in this compilation of Justinian, nearly all obsolete peculiarities omitted, and so much of the *jus gentium* (which had gradually increased with the increase of the Roman Empire) adopted, that it was by all these qualifications most fitted for all the different countries within the Roman jurisdiction at that time, as well as for use in modern Europe.

Such a production, at that period of decline, is only to be accounted for by the peculiar abilities of the compilers. The direction of the whole work was entrusted by Justinian to Tribonian, a man, who, in his

<sup>1</sup> Blume über die Ordnung der Fragmente in den Pandecten, in V. Savigny's Zeitschrift. N. 6, pp. 257—472.

enlarged mind, contained all the science of his time. He was assisted, too, by professors and advocates, scientific and practical men.<sup>1</sup>

Notwithstanding the great merit of this work, opposers have regarded it as one cause of the loss of the genuine sources, whereas it has been the means of preserving at least what still remains.

Still, if, in the work as a whole, small defects are of little moment, we must remark, that the few contradictions and repetitions, which are found in it, are owing to the haste with which the work was accomplished, a circumstance which could have been very well avoided.

The first draft of the Code was accomplished in one year, A.D. 529; the Digests in three years, A.D. 533; and since the first edition of the Code of the constitutions was found too defective, it was made anew, and accomplished in one year, together with the Institutions, A.D. 534, and the whole was consequently completed in the short space of five years. The *Novellæ* (later constitutions issued gradually,) were added to the main work at a later period. It is probable, that, if they had not so hastened this great work, but had given a few years more to it, they would have avoided even these little defects. The "*Nonum prematur in annum*" ought not to be forgotten here, in this most difficult of all works—lawgiving. After the promulgation of this code, there were no prætors, as formerly, to develop the law consistently with the code during the following centuries. But the emperors, having the sole legislative

<sup>1</sup> He was assisted by four professors and twelve advocates in the Digests; by dignitaries in the first Codex, and in the Institutes by two professors.

power, by contradictory decrees, produced a most disastrous uncertainty in the law, and by want of consistency, destroyed much of its harmonious structure.

• The spirit of the Roman law was worthy of the best form; its merits are consistency and mathematical accuracy, which are due to the genius of the Roman jurists, and to their peculiar tendency of educating men to the law by addressing continually their reason and morality. In modern times, statutes are often in direct contradiction with morals. Among the Romans, law and morality were in the greatest harmony. Consequently, their government and laws were inscribed indelibly in the souls of the citizens.

#### THE PRUSSIAN CODE.

THIS system, in common with the Austrian and French, has the Roman law as its basis, which had been reduced and combined, with the local laws of the previous centuries, into one promiscuous mass, together with a great number of new statutes. To bring order and system out of this mass, was the intention of each code. The time of their compilation was not far different. The first impulse was given to the Prussian code in the year 1746, by Frederick the Great; to the Austrian code by Maria Theresa and the intelligent Joseph II., in 1767; and under Napoleon was made the Code Napoleon, from 1803 to 1807. The rulers who favoured these codes may be counted undoubtedly among the greatest and most intelligent of modern times.

These codes, (all of which are now in use,) although, of course, they require the study of the sources from

which they have been derived, have rendered the whole law much more easy and clear.

The Prussian code was compiled with this grand purpose in view:<sup>1</sup> that it should contain the whole of the practical law of the kingdom, and yet the local laws of the several provinces remain in force; should arrange the existing law, embodying with it some additions, and without any unnecessary haste. Suaretz, a very talented man, gave to the whole work its plan and consistency, in which he was assisted by the most able and learned men of Germany, in the following manner: A plan was first made and published, which was offered for criticism to all the learned men, statesmen, and jurists of the whole German nation;<sup>2</sup> prizes were offered for the best remarks, which were furnished very abundantly by the German universities, which are combinations of professional schools of theology, jurisprudence, medicine, and philosophy. By this means, after it had been thus before the enlightened public, and had been repeatedly considered, it was finally published in 1791. This method of procedure would be advisable in other countries, in bringing such a work to a high state of perfection.<sup>3</sup>

<sup>1</sup> Bericht von Simon über Redaction der Materialien der Preussischen Gesetzgebung, in Mathis juristischer Monatsschrift. Vol. XI. part 3, pages 191—286.

<sup>2</sup> Prussia, though entirely independent in its state organization, and though sustaining its own individual relations with the other powers of Europe, still having a German people, and situated in the midst of Germans, takes its part in all matters affecting the general interests of Germany, and is one of the most eminent members of the German confederacy.

<sup>3</sup> Mr. Hiersemenzel has recently revised and codified the new

## THE AUSTRIAN CODE.

THE compilers of this code were ordered<sup>1</sup> not to confine themselves to the Roman law and the existing local laws, but in every point to follow the dictates of equity and reasonableness. The basis of this code was, after all, the Roman law, and the commentaries on it, contained in eight thick folio volumes. It was finished in 1767. From this, Horten made an abstract, which was prepared for the code by Martini. This code was then published, and communicated to the Austrian courts of justice and universities, for their examination. After their criticisms, the work was again reconsidered, and then published as a code. They did not take advantage of the literature and science of the German universities, and learned men in general, in this business, as the Prussians did, and they thereby lost a very valuable co-operative influence, which was owing to the small degree of intercourse between the learned men of Austria and of the different provinces of Germany. It is certainly improper, intentionally to neglect to hear the opinion of the most able men of the time. Thus the work, which, to have been perfect, should have occupied the scientific men of the whole nation, was accomplished by the state in its own isolated character. The isolation of the state diminishes the possibility of an entirely satisfactory result of any general enterprize. Therefore the code formed under these

statutes of Prussia, a work which, for its clearness and the systematic order in which it was completed, deserves high praise.

<sup>1</sup> Zeiller's *Vorbereitung zur neuesten Oestreichischen Gesetzkunde*. Wien und Triest, 1810. Vol. I. pages 19—30.

circumstances was far less favourable than it otherwise would have been; but yet it must be acknowledged, that the code possessed great merit for the clearness with which it has given the general principles and rules, although it needs more precision.

### THE FRENCH CODE.

At the time of the compilation of this code, several circumstances conspired to prevent it from being as good as might have been expected. The knowledge of the law at that time stood at no very high eminence, since all attention was drawn towards politics, and very seldom towards the investigation of science. And, unhappily, those four lawyers to whom Napoleon entrusted the preparation of the work, were particularly deficient in a knowledge of the Roman law, which, with the customs (*coutumes*), formed the source from which much of the code was derived. But those men, among whom Portalis, Bigot-Preameneu, and Maleville were more eminent, possessed much talent. Another disadvantageous circumstance was, that they hastened their work too much.

The revolution had destroyed also, with the old government, a great part of the civil law, and new rules had taken its place, which, with what remained, required to be reduced and combined into one harmonious whole. This would have required the most thorough and accurate labour of years to prepare a work that should comprise the whole civil law for a great realm. Instead of which, they were obliged to hasten it, in order to heal, in that point, the wounds of the revolution as soon as possible.



The plan of the code was very briefly sketched, and in a few months communicated to the highest courts of justice, for their criticism; then amended in the council of state, and immediately laid before the *tribunate*. This body was justly severe in its criticisms, blaming and rejecting some parts of it; the draft was then withdrawn, and the opposing members were removed, and new ones placed in their stead.

In this purified tribunate, preliminary discussions were held, in which their opinions and wishes were considered, and in the sessions of the years 1803-4, praises only of the drafts were heard. All parts of it passed, and received the name "Code Civil des Français."<sup>1</sup>

When, at a later period, the republic was transformed into a monarchy, many things were accordingly altered in the code; and it received, in 1807, the name "Code Napoleon."

That, according to the history of its compilation, the code could not be perfect in its contents is evident; and since it introduced, in such an imperfect manner, in part, the new law, it brought lawyers into many difficulties in trying to apply it; still the better parts of it deserve praise for their clearness. It is to be regretted, that the force and learning of a Montesquieu could not have given soul and consistency to the whole work, and his peculiar precision to its outward form.

<sup>1</sup> All these discussions are printed in: "Conférence du Code Civil avec la discussion . . . du Conseil d'État et du Tribunal." Paris. Didot, 1805. 8 vols. in 12. "Code Civil suivi de l'exposé des motifs." Paris. Didot, 1804. "Analyse des Observations des Tribunaux et du Tribunal de Cassation sur le projet du Code Civil." Paris. 1802. "Maleville, Analyse raisonnée de la discussion du Code Civil." Paris. 1807.

Then, indeed, would a work have been obtained which would have satisfied the demands of the nation and restored its equilibrium.

### C O N C L U S I O N .

Now that we have exhibited, openly and impartially, the merits and defects of these four codes, we must declare our conviction that the errors, which have been committed in their construction, do not exclude the possibility of a better procedure and more satisfactory result. It is possible to avoid these faults by adopting only what has been good in former experiments; and, for the rest, making the proper attempts to improve and complete them. We may here very properly apply, in conclusion, the words of Schiller on the legislation of Lycurgus (Works, vol. XVI. p. 114): "Although the first experiment has proved defective, it must still be always remarkable to a philosophical inquirer into the history of mankind. It is a grand movement of the human spirit to treat that as an art which had before been left to accident and passion. The first step in the most difficult of arts must necessarily be imperfect, but it is always valuable, because at the same time made in the most valuable of all arts. The sculptors began with 'Hermes' columns,' until they could rise to the perfect forms of an Antinous or an Apollo of the Vatican. The lawgiver must practise long in rough experiments, until, at last, the happy harmony of the social elements starts forth full formed. The stone suffers patiently the progress of the forming chisel, and the strings

which the artist touches answer without resisting his fingers. The lawgiver alone labours on a self-acting, obstinate material; human freedom will permit him only imperfectly to realize the ideal, which he may have entertained ever so clearly in his own brain. But here the mere attempt deserves all praise, if undertaken with disinterested benevolence, and presented with consistent moderation."

---



## II.

# COMMERCIAL POLICY.

---



## COMMERCIAL POLICY.

---

### 1. THE GERMAN ZOLLVEREIN.

THE question of the influence of a "Revenue Tariff with incidental protection", as it is termed in America, upon population, revenue and political influence, is admitted by all to be one of great public importance; and the results of the system as inaugurated and still preseeded in, by the states of the German "Zollverein" as well as by England and the United States, are important as bringing the aid of experience to assist in the determination of the correctness of the theory upon which it is based. The simplest and most conclusive form in which these results could be exhibited, and the problem be investigated, would be that of presenting complete and accurate statistics of the manufacturing industry of the Zollverein states, year by year, so that the eye would see at a glance, whether the system in its operation has advanced, impeded or left uninfluenced the manufactured products of the national industry. Unfortunately it was not until Nov. 11th, 1843, that the General Conference of the Zollverein, then in session at Berlin,

determined upon collecting this important information. The statistics for the years 1849 and 1852, published at Berlin in 1855, indeed prove that manufactures were flourishing in Prussia and the then states of the Union, but give us no means of accurate comparison with former years.

But as the statistics of population and revenue are exact and extend backward through a long series of years, and as population always increases with its means of support, we can justly turn to these tables as a means of reaching the subject of our present enquiry.

I shall, however, limit my review to the period commencing January 1st, 1834, and ending January 1st, 1846. I begin at the former date, because that was the point at which the Zollverein system went into operation: I close with the latter, because after it came the season of bad and insufficient crops (1846), then in 1848 and subsequent years the disordered state of society owing to the revolutions in Europe, and then the period of the war in the East and of the bank-crisis of 1857; all of which causes have effected very greatly the natural development of industry. The period embraced in my review on the other hand was one of peace, free from all the disturbing influences of uncommon events, and may properly be considered a series of normal years.

The population of the states forming the Zollverein on the 1st of January 1834 was 23,478,120 souls; on the 1st of January 1846, this aggregate had increased to 28,498,935. This increase, equal to about 5,000,000, consisted of two classes of persons; the first, amounting to 2,273,895, were added to the population of the Zollverein by the adhesion of new states to the system;



the second, amounting to 2,746,920, was the actual increase of the population of the original Union, and was equal to an addition of eleven per cent.

The revenue collected from the customs was in the year 1834, only 14,515,722 thalers; but, while there was no change in the tariff, it went up to the sum of 27,422,535 thalers for the year 1845, showing an increase of 89 per cent., or being nearly doubled. This revenue, I may remark, is divided among the states of the Verein in the ratio of their population respectively.

Now, as the amount and value of the imports of a people depend upon the means of the importers to pay for them by the exchange of the surplus of their own productions, this great increase of the revenue shows conclusively a corresponding increase in the wealth of the people. We cannot, however, arrive at the actual values of the imports and exports of the Verein, because the duties are paid according to the weight, and not according to the value of the goods.

Again, we are unable to show with certainty the main channels of the commerce of the Zollverein states, because the statistical tables omit to mention the countries in which the goods levied upon are produced. This defect in the tables was a consequence of the fact, that the great ports of the North Sea, through which the commerce of the Verein was mostly transacted, were not members of the Union. As the navigable rivers of the Zollverein states flow either into the North Sea or the Baltic, commerce naturally tends to the north-west of Europe and to America. This defect in the tables, however, will not longer exist, or at all events but partially; for in 1851 Hannover and Olden-

burg fully joined the Verein, and in 1856 Bremen, though remaining separate, granted to the Verein the privilege of the warehousing system upon her territories. The Zollverein consequently now touches the North Sea, as well as the Baltic, and includes (1859) a population of over 32,000,000 souls.

Another treaty, made with Austria, Febr. 19th, 1851, reduces several imposts, and the Austrian government has voluntarily since that date again lowered the duties upon sundry articles, in order gradually to assimilate her high protective tariff to that of the more moderate Zollverein. The reason of this step is, however, political. Austria is desirous of becoming a member of the Verein, as a means of increasing her political influence in Germany. As her population is above 38,000,000, she would, if a member of the Verein upon equal terms, have of course a preponderating influence, precisely as Prussia now, owing to her much greater population (17,000,000) than the other states, occupies that position. This increase of Austrian influence in Germany is a vital point with that empire, as a means of curbing and restraining her heterogeneous population; her German subjects are but about 8,000,000, to some 30,000,000 of Hungarians, Sclavonians, Italians, &c. The greater, therefore, her power in Germany proper, the more extensive will be her means of working out her system of oppressing one nationality through the force of another.

To those designs of Austria, so evident to every well informed observer, Prussia and other states, especially those in which the religion is protestant, are not willing to lend themselves, nor to give up to her the hardy earned fruits of the Zollverein system, which

has cost them so much labour and so many sacrifices. They see in a full commercial union with Austria nothing but a sacrifice of all Germany to the interests of that despotic government. There is too much danger that if she were allowed the control of the material interests of Germany, she would soon make herself the dictator, and that freedom of conscience and thought—the foundations of political and civil liberty—together with the whole literature of Germany, which rests upon the same foundations, would be endangered, perhaps crushed. They certainly could not exist and flourish under the overwhelming power of despotic and catholic Austria, where the recent Concordat has granted to the priesthood entire control over the press and the education of the people. There lies the danger; otherwise a perfect equality of rights between catholics and protestants would be desirable, should there ever be a united Germany.

But Austria is indefatigable in the prosecution of her plans. Nothing but the greatest vigilance on the part of her opponents can protect Germany from the danger, which threatens her political and intellectual life. Through the material interests of the nation, she seeks to extend her political power. Although it is very desirable that friendship should exist between the two countries, still the dangers of any intimate connection or commercial union with Austria ought to be avoided by Prussia and the constitutional states of Germany.<sup>1</sup>

Previous to the adoption of the Prussian tariff by

<sup>1</sup> I refer to my work: "Beiträge zur Nationalökonomie und Handelspolitik" article IV, "Ueber den Handels- und Zollvertrag und die in Aussicht gestellte Zolleinigung zwischen Preussen und Oesterreich" pages 87—138. (Published at Leipzig 1851.)

the states forming the commercial league called the *Germanic Union* or *Zollverein*, each state followed its own policy, and consequently continually interrupted the commerce of the interior by custom-houses placed at its boundaries, to the great disadvantage of those occupied in that branch of industry; and as a natural consequence, goods were smuggled into the interior through the northern states, whose ports were left free for such importations. Moreover, other nations on account of greater facilities for manufacturing, could afford to undersell, and, therefore, monopolize that market, to the material injury of German *manufactures*; while they opened their market for the *agricultural* products of Germany only when in want, and as soon as supplied immediately closed it. Thus the investments of the Germans in agriculture and manufactures were sometimes profitable, and at others the reverse; and as no branch of industry suffers alone, commerce suffered with it; all which had the effect to compel many of the capitalists to invest their funds in other countries.

In order to counteract these disadvantages, and to employ at home this emigrating capital, and thereby increase the home market for their agricultural products, the Prussian government in this case, as in many others of general interest, taking the lead, adopted a tariff<sup>1</sup> for the protection of those manufactures which are *natural* to the country, in order to enable them to compete with those of other countries. In the year 1834 many other states united with her, among which are Saxony, Bavaria, Wurtemberg and others; and they divided the

<sup>1</sup> Tariff-law of May 26th, 1818.

revenue among the whole according to their population respectively. The first mentioned, Saxony, had advanced to a high degree of perfection in her manufactures; notwithstanding this fact, Prussia, in uniting with her, sacrificed some temporary interests by offering her market for the manufactured products of Saxony. In establishing this tariff, it was laid down as a fundamental truth, that the principle of free trade, permitting without artificial barriers the interchange of the surplus produce of all countries of the world, was correct, and that an exception was only to be made in favour of the manufactures, whose progress had been crushed by the long war with France, whilst they were flourishing in other countries. An equal historical development of industry in the competing countries must be presupposed, in order that an equal competition between them or free trade can exist, competition being a war of the industrial powers directed, as is all war, towards the destruction of the weaker competitor. But when once manufacturing industry is placed upon a firm foundation, the tariff is to be gradually lowered, until at last it becomes one for revenue merely. Consequently this tariff contains no tax that would amount to a prohibition; all raw materials for manufacture are imported free of duty, and the exportation as well of the produce of agricultural as of manufacturing industry is also free of duty. *Protection* is only given to manufactures of *natural growth*, sufficiently to put them on an equal footing with the foreign in the market, and to secure a sound and firm standing.

The basis of this tariff is calculated to be an *ad valorem* duty of 10 per cent. on *manufactured* articles,

but the duties being levied by weight, vary from about 2 per cent. *ad valorem*, on light and valuable articles, to a high per cent., on heavy articles. This levying by weight is a decided defect of the Zollverein-tariff, and should be reformed, for it increases very much the price of heavy and coarse articles, which are mainly used by the poorer classes of the people, while it leaves the valuable articles, used by the rich, almost without a tax. The articles which are levied upon include also some of luxury; and the tax on these *is not considered as protection, but as a revenue*. The system of the tariff described differs from others in not protecting every thing, and thereby preventing the injuries which result from other systems, where protection is extended to every branch of industry; as for instance, to prevent the injury to the agricultural interest, from protecting the manufacturing, they extend it to agriculture, and thereby render every thing so dear as to diminish the exportation to foreign markets, which are supplied by the cheapest producer. They forget the principle, that whatever increases the price of raw materials increases the price of production.

The *results* of the Zollverein-tariff and the Commercial Union have been advantageous to agriculture, manufactures, and commerce, by creating a free trade through all the Zollverein states, the only condition in which it is possible for internal industry to prosper.

The German states lying upon the North Sea, Hannover, Oldenburg, &c., called the "Steuerverein," as mentioned above, joined the Zollverein on Sept. 7th, 1851, with their two millions of inhabitants, and with their seaports Harburg, Emden, Leer, Geestemünde, &c.

By the same contract of Sept. 7th, 1851, the advantages of the English warehousing system are introduced in these ports and in all ports of entry of the Zollverein.

Bremen concluded a new contract with the Zollverein on the 26th of Jan. 1856 in reference to the warehousing system; and the "Sundzoll" or sound-toll hitherto paid to Denmark, is from the 1st of April 1857 abolished by a contract concluded on the 14th of March 1857 between Denmark on one side, and Great Britain, France, Austria, Prussia, Belgium, Hannover, Mecklenburg, Oldenburg, the Hanse Towns, Sweden and Norway, Holland and Russia on the other side;—Denmark receiving an indemnity of 30,476,325 reichsbankthalers.—

Now merchants and capitalists in the ports of the North Sea, in Harburg, Emden, Leer, Geestemünde, &c., and in the ports of the Baltic, in Stettin, Danzig, Königsberg, Memel, &c., will be enabled to enter more freely into the transatlantic trade, enjoying it, together with the Hanse Towns. From these ports they will send their goods in smaller craft by the Elbe, Weser, Oder, &c., or by railroad, into the interior. This will concentrate a great amount of business in those ports. They will now rise, as the American seaport cities have risen, in proportion as railroads and steamboats have there created and facilitated business and travelling. It would be strange, if, with the striking examples, which the American seaports afford, before their eyes the governments and the people of the German seaports should not favour every measure, which, besides increasing the amount of their own shipping, must also concentrate much of the business and shipping of the Zollverein in their ports. The inhabitants of the seaports

and of the Zollverein states ought to feel a deep interest in the welfare of each other. The increasing import and export trade of these ports is as beneficial for them as for the Zollverein. They ought to proceed upon the principle that, as all Germans have a common origin, common wants and literature, they must have common interests, a common commerce, and a common future.

But several of the public papers have presented discordant views of the commercial policy of the German Zollverein and of the influence which it is said that Prussia exercises over that policy.

These opinions having arisen more or less from the conflict of local interests affected by the Zollverein and its commercial policy, and from false apprehensions with regard to an adverse settlement of the respective interests between the said states and the Zollverein, the following observations, founded on a statement of facts, will allow an impartial opinion to be formed.

One of the principal objections which have been made to the Zollverein, is, that Prussia is said to exercise an overwhelming influence over the other members of the Union. The question, whether such an influence does really exist in the Union, may fairly be answered by the fact that those states *voluntarily* joined the confederacy. The question, whether the organization of the Zollverein system, established by Prussia, offers any ground for such an accusation, should be submitted to a closer examination. The following facts will speak for themselves:—

According to the treaties on which the Customs Union is founded, no new tariff law, nor the alteration of any existing one, can be made *without the agreement*



*of all the members of the said Union.* No such act can be passed by any majority of votes. The several states which form the Union, without regard to their population, or the extent of their territory, have all equal votes; and the single vote of the smallest of them, if in opposition to any measure, will prevent its adoption, even if the votes of all the other members should be in favour of it. Thence Prussia, with a population of over 17,000,000, and Brunswick, with 200,000, have equal votes.

It has been said, in certain quarters, that this complete equality of representation of all the states of the Union has been used by Prussia as a means of inducing the said states to submit to her original customs system, and to maintain her influence over them; but this influence is only a moral one, and an impartial examination of such an imputation will show, that all the German states which have united with Prussia, in the formation of a common system of customs and commerce, have adopted the Prussian system, with slight modifications, always by the way of free treaties, which were submitted beforehand to the examination and ratification of the governments and representatives of the respective countries. If ratification has not been refused by them in any single instance, the reason of it is its conveniency, and not the influence of Prussia. It is the conviction that the Prussian system, whose advantages had been experienced for many years, was the best adapted for the basis of a German Union of Customs and Commerce (the Zollverein).

The leading principles of this system, which secured its adoption by the other German states, are as follows:—

I. The maintaining a proper medium between the principle of protection and of free trade.

II. Allowing a competition of foreign with the home industry, in the home markets; consequently, the exclusion of prohibitory duties.

III. A complete and true reciprocity with foreign countries.

IV. Facilitating the interior trade, by removing the customs between the states.

V. Protective duties, for the support of home industry, not so great as to prevent commercial intercourse with foreign nations, or their competition.

VI. Establishing and regulating custom duties with a regard to the interests of every part of the confederacy.

VII. Free importation of the raw materials for the home manufacture; and,

VIII. Convenient duties on those foreign articles, viz: sugar, tobacco, rice, &c., the principal export of other countries, to promote and facilitate the conclusion of reciprocity treaties.

To such a system of customs and commerce, the other German states could join without any hesitation, because Prussia had made the experiment, and the result had been such as to induce imitation. This experiment was the more important for Germany, as Prussia unites under her dominion several provinces very different in climate, production, and in other circumstances; and whose interests, although different, found a sufficient protection in the said system, which, having been a blessing to the Prussian provinces, could not be otherwise to other German states which are in the same position.

However, this adoption, by some of the German states, of the Prussian customs-system, has not prevented its development and improvement since, by common deliberation and resolution, whenever there has been occasion for it. On the contrary, since the Zollverein has been extended to its present state, the most important laws, viz: the new customs-law, the customs-organization, &c., have passed, after a previous examination at the meetings of the plenipotentiaries of the several states; and, in the same manner, provisions have been made to carry into execution the said customs-laws.

The present constitution of the Zollverein has only preserved the old Prussian customs-system in its leading ideas and principles before mentioned, which could not have been abandoned without destroying the commercial confederacy.

Another charge made against the Zollverein, is, "that it presses upon the Hanse Towns". This charge has attracted the attention of those nations which are in commercial relations with those states, because they find in the Hanse Towns a most favourable market for their products. These towns, whose principal interests are commercial, impose upon products not European very moderate, or mere nominal duties, in comparison with those imposed by the Zollverein, and, from this circumstance, apprehensions were entertained that the extension of the Zollverein to the North Sea would be disadvantageous to the commercial intercourse of countries not European with the Hanse Towns.

Such an apprehension is without foundation. The people of the Hanse Towns, who, in the export-lists published in the respective countries of exportation,

appear as the principal customers, are only the forwarders for the greatest part of transatlantic products, and the real consumers are in the interior of Germany. Since, therefore, the small German states on the sea-coast have joined the Zollverein, and the tariff of the latter prevails, the apprehended diminution in the consumption of foreign products, in consequence of somewhat higher duties, can possibly take place only among the small population of the said states; but, by their annexation to the Zollverein, more advantages are secured to the said export countries, in consequence of the great development of direct commerce between them and Germany.

In order to explain this by an example, we shall draw a comparison between the commercial position of the Hanse Towns, (Hamburg, Bremen, &c.) and the American seaport cities. The Hanse Towns are free ports, and desire to remain excluded from the commercial policy of the rest of Germany;—the American seaport cities, New York, Boston, Philadelphia, &c., are included in the general commercial policy of the United States, and have not been permitted to establish themselves as free ports. Now, we would ask, are less European goods imported into New York, and consumed in the interior of the states, because New York is no free port? Since the United States form one great commercial confederacy, they have unity of interests, have consequently power, and are able to establish a direct commerce with the whole world, whereby the American seaports gain as much as if they were free ports, and all the interior of the United States partakes of the advantages of that trade. All parts of the United

States gain more, by such a harmonious union, than they would do, if the seaport cities were allowed to carry out, with foreign nations, a policy different from that of the United States. New York imports and exports, on the whole, as much as if it was separated from the tariff system of the Union. Its natural position secures as well its commercial importance, as that of Hamburg or Bremen does. The latter would lose as little, if they were included in the German Commercial Union, as New York, by belonging to the American Commercial Union.

There is, however, no foundation for an apprehension that the Zollverein should employ coercive means to enforce the annexation of the Hanse Towns to the Customs Union. By what means could such a coercion take place? The only means would be to impose higher duties on all products entering into the Zollverein by the seaports not belonging to the Union, than on those imported by the ports of the Zollverein. But such a discrimination has not yet been made, although it will become more and more practicable by the extension of the Zollverein to the North Sea, and by the conclusion of the railroad net over all Germany, without any considerable injury to the consumers in the interior.

The policy of the Zollverein, in its relations to those German states which have not joined the Union, always has adhered to the principle that the annexation should take place voluntarily, and under the conviction of its expediency; because history shows us that reluctant confederates are worse than enemies, and because the disregard of that principle would only weaken the Union, and endanger its futurity.

## 2. COMMERCIAL TREATIES BASED ON FREE TRADE PRINCIPLES WITH REFERENCE TO THE COMMERCE BETWEEN THE UNITED STATES, ENGLAND, AND THE GERMAN ZOLLVEREIN.

WE will resume the explanation of the principles upon which the tariff of the German states, forming the "Commercial League," (called the Zollverein,) is based. In establishing this tariff, it was laid down as a fundamental truth, *that the principle of free trade, and the necessity of obliging other countries who practically do not hold to it, to come at some future time to more generous terms, was correct*; and for this reason it was designed to set them an example of moderation, by which manufacturing industry would grow up in the natural progress of development. Consequently, this tariff contains no tax that would amount to a prohibition; *all raw materials* for manufacture, are imported *free of duty*, and of course all American raw materials.

The *exportation is free of all duty*. The tariff is a *revenue tariff*, and gives, only as such, a *moderate* protection to manufactures *of natural growth*, which is found sufficient to put them on an equal footing with the foreign manufactured articles in the market, and to secure a sound and firm standing, since a low revenue tariff reconciles all interests, and is therefore not so liable to change. It is the intention, at some future period, gradually to reduce the tariff, in order to keep the manufacturers diligent in the competition with other countries. The basis of this tariff is calculated to be an *ad valorem* duty of 10 per cent. on

manufactured articles. The report of the select committee of the House of Commons on import duties of 1840, justly acknowledges that the tariff of the Zollverein is the lowest in duties, and the least as to the number of articles taxed; their number amounting to about forty-three, but in the English tariff in the year 1840, before the recent reductions, to about eleven hundred and fifty. Articles of luxury are taxed higher; for example, wine, tobacco,—and the latter is taxed incomparably lower than in other European countries.

The Zollverein taxes tobacco from two and a half to four cents per pound, while England taxes it at about seventy-five cents per pound. England consumes, on an average, twenty thousand hogsheads annually, and her treasury derives from it a revenue yearly of about eighteen to twenty million dollars.<sup>1</sup> The states of the Zollverein consume annually an average of twenty-eight thousand hogsheads of American tobacco,<sup>2</sup> and derive from it a yearly revenue of only about two million dollars, being only one tenth part of that of England. Austria is not included in this calculation, because tobacco is there a monopoly with a yearly revenue of twenty-two millions of florins. In France also tobacco is a monopoly of the government, which derives yearly from it a revenue of about twenty millions of dollars. The high impost on tobacco limits its consumption.

It is evident that this German tariff is not disadvantageous to the commerce of the United States, since

<sup>1</sup> The net produce of the revenue from *tobacco* was for the year 1852 = £ 4,466,468.

<sup>2</sup> Thus already in 1845.

the raw materials of that country are received there free, or at low rates of duty.

The use of American raw materials in Germany is much greater than appears in the statistics of the imports and exports of the United States, since they come not only through the ports of the Zollverein, but mostly through the free ports of Hamburg and Bremen, which do not belong to the Commercial League, but are in fact her best ports; and in an indirect way through Belgium, and through England, France, and Holland. The American raw materials, particularly cotton and tobacco, to be used in the German factories, amount by the last statistics to more than France consumes in her manufactories.

The colonial policy of France, Holland, &c., stands in the way of the realization of the reduction in duties, which the American and German states can mutually give to each other, since the latter have no colonial interests to protect. The American and German states and England would find it now to their advantage to assimilate their tariffs, in order to mutually grant advantages which some other countries, according to their colonial policy, try with their colonies to enjoy to the exclusion of the rest of the world. By establishing a just and real reciprocity of free trade, England, the United States, and Germany would gain great advantages, and acquire more and more customers on the continent of Europe and of America, particularly among the inhabitants of those states, amounting to thirty-two millions, which are incorporated in the German Zollverein, and would moreover become independent of the monopoly system of other nations.



Germany and England appear desirous to co-operate with the United States in establishing a more liberal and equitable commercial policy. England is situated decidedly better than before the passage of the Reform Act of 1832, to take an active part in bringing about this consummation much to be wished for. Her colonial policy obliges her no longer, since the repeal of her Navigation Acts, to exclude Germany and the United States from favours, which she in preference gave to her colonies. The United States and Germany, not possessing colonies, can freely grant mutual advantages. The clause, in most of the existing treaties, promising the same advantages as are enjoyed by the most favoured nations, is often represented as an impediment to new treaties, but it does not appear to us to be the fact; since, according to true reciprocity, all other states can obtain the same advantages, provided they will grant similar profitable reductions on their tariff system, as the other states are ready and willing to give. If treaties of commerce on principles of reciprocity of free trade should be ever made between the United States, the German Zollverein, and England, and any other nation should demand to be placed on a similar footing, she ought to be ready to make the same reductions in her tariff that the treaties offer. It would be desirable to establish, by *commercial treaties*, a *firm* and *permanent basis* for their industry, as the continual alteration of the tariff laws with every change of the political parties, is one of the greatest evils that befall the industrial portion of the country. All classes of practical and intelligent men care less what the rate of duty is, than that it be stable,—and in or-

der to preserve its stability, it must be moderate, otherwise the consumers would be constantly urging an alteration. Some theorists consider treaties of commerce as useless and vain attempts of two nations for overreaching each other; but the question is not who shall obtain an advantage over the other, but rather how to realize, by reasonable and just means of commercial treaties, *an approximation to the principles of free trade*, which have been so long and disastrously disturbed. The principles of free trade are admitted to be true, by the United States and England, in theory, but not fully put in practice by either. Experience has shown conclusively, that we must seek an approximation to the practical acknowledgment of these principles, by means of treaties, because the ramified commercial interests and movements of the civilized world demand, above all things, a safe basis; nothing proving so destructive as vacillation.

If the United States would manifest a disposition to enter into treaties of commerce with the German states upon the principles of reciprocity and free trade, they would thereby probably induce England to change her policy towards the United States by a similar treaty. Every one will remember the apparent uneasiness with which the administration of Sir Robert Peel regarded the endeavours to establish a commercial treaty between the United States and Germany.

The effect of the former protective policy of England has, in a general way, been much overrated, and the true cause of England's commercial prosperity has been attributed to it, when, in a point of fact, it is chiefly indebted to causes of a very different nature.

England owes much for the flourishing state of her manufactures and commerce to her geographical position—abounding in harbours and mineral productions, fertile soil and temperate climate; always enjoying peace at home, by carrying the war into other countries; by which means all branches of industry could develop themselves, besides having a dense population of intelligent, industrious, and persevering people. She is also greatly indebted to the fact that her farming population enjoyed a favourable position, stimulating to the accumulation of an immense capital, upon which has been based her manufactures and commerce. She has enjoyed, for several centuries, what the greater part of Europe has only realized during the present. It is however a matter of much gratification, to reflect upon the circumstance that the United States and Germany are blessed with all the advantages of the English agriculturist, in point of soil, climate, persevering industry and intelligence, with a superiority in the extent of the lands, and the tenure by which the farmers hold them, as in Germany and America the farmers are land-owners.

While the European powers on the Continent, until the year 1815, were almost constantly involved in wars with one another, breaking down their agriculture, manufactures and commerce, the English were building up those great interests, having a ready market among those belligerent nations for their surplus productions. The prices of all sorts of goods had risen very high since the enactment of the "corn laws," and in consequence of the great expansion of the paper currency; but the farmers were able to pay the landholders a high rent

for their lands, because they could sell their produce at a proportionably higher price to the manufacturers, and the latter were able to give high wages to their workmen, since the manufactured goods could be sold at an advanced price to the whole world. It is well known, that the consumers have to pay all the cost of production, taxation, and profits, under which the manufactured goods were produced; hence, the English producers could carry on, in all countries, a monopoly trade on account of the superiority of their goods, and the absence of manufacturing skill and capital in other countries. From the time of the French revolution to the peace of 1815, they increased and enhanced the value of their productions so much, as to receive all expenses, including the capital invested, taxes, and profits, and could burthen with them the foreign consumers. The latter paid, indeed, on those manufactured goods, the ground rent, high wages and duties, which the producers had advanced. England rendered in this way the whole world contributory, and threw the restitution of a great portion of the interests of her state debts on the shoulders of foreign consumers. This situation of things is changed, and the English duties now fall partly on the English and partly on the foreign consumers, since the competition between them and the foreign manufacturer has become closer. Since 1815, almost general peace has reigned in Europe, and all branches of industry have begun to develop themselves, but they found that England's wealth, skill, and experience, in the meantime, had built up an enormous superstructure that gave her a vast ascendancy over other countries. The extent to which steam-power has

been applied to all kind of machinery, almost annihilating time and space, had also given to her great facilities. She could receive and execute orders in a tithe of the time continental countries could, and thereby was enabled to supply foreign markets with her manufactures.

Steamboats and railroads alter the commerce of cities and countries, and concentrate business in the seaports and manufacturing districts. They would have given a decided preponderance to England, had not the greater proximity of the raw materials, the cheapness of labour, and the increased skill of the manufactures of continental Europe counterbalanced it. The English ascribed the latter effects, so far as Germany is concerned, only to the tariff of the Zollverein. But the results of that tariff have been advantageous to manufactures and commerce, principally by creating freedom of trade through all the German states of the League - the only condition in which it is possible for her internal industry to prosper. They overlook that its basis is only an *ad valorem* duty of ten per cent., as above mentioned, not a protective tariff; the nearest approximation to principles of free trade existing in any country. They ought to acknowledge that, with a nation of such a commercial policy, commercial treaties might be easily and advantageously formed free from liability of change on account of their equity.

England has found it for her interest to establish *free trade of food and of raw materials*, in order to favour the cheap production of manufactured articles, retaining, however, the protection of some manufactured goods by her new tariff of 1846.

Since England receives now the raw materials for

food and for her extensive manufactories *free from duty*, it would seem to be for the interest of some of the countries of Europe, to produce on their rich soil those *raw materials*, and to purchase the manufactured goods as cheaply as possible, consequently *free of duty*. Now England will naturally be, by the better condition of her labourers, a much more happy manufacturing country for a great part of the world; to which her industry, her immense manufacturing capital, skill, coal mines, geographical position, &c., seem to have designed her. But until the landed interest of England agreed on better terms with other countries, the latter were obliged to seek for a sure home market of their surplus of raw material by home manufactories.

Under the "corn laws", the English manufacturer was unable to compete with those of America or Germany where food and wages were much lower in price. The commercial policy which the latter nations were obliged to adopt has caused the repeal of the English corn laws and of some protective duties; but the result will finally be free commerce, based on treaties of free trade principles. The statesmen of England, Germany and of America are generally the professed advocates of free trade; but in practice they are still the supporters of a protective system; judging from their actions, the theory of free trade is made for exportation, not for domestic use. That an unshackled commerce would be of immense benefit to the civilized world cannot admit of a doubt; but the great commercial powers of Europe and America refusing heretofore to agree to it, the Zollverein states were compelled to look to their own immediate interests.

Under the present state of the commercial world, and the conduct of its nations and statesmen, suitable treaties of commerce, in order to realize an approximation to the principles of free trade, are necessary.

Measures for increasing the direct commerce of Germany with other countries are among the principal objects of the Zollverein; and are also worthy of the serious attention of the people and statesmen of other countries.

It may now be proper to point out some of the advantages which would result from the extension of free commerce between England, the United States and Germany, and to enumerate some of the present disadvantages under which that trade is carried on.

The laws of some European countries favour very essentially their own shipping and their commerce with their colonies, treating unfavourably the shipping of other countries. They have frustrated a free and liberal intercourse among nations by their colonial policy,—a policy founded on the idea of retaining a monopoly of the colonial trade in the hands of the mother country, to the exclusion of the rest of the world. There can be no real reciprocity between nations thus treating their colonies and other countries, and those nations who possess no colonies.

Germany has always treated the vessels of all other countries very favourably; and she looks in this respect particularly to England, since the latter repealed her Navigation Acts, to the United States of America and to Mexico, because they, as well as Germany, having no colonies to favour, possessing vast territory and

millions of industrious inhabitants on both sides, can mutually establish true and fair reciprocity, which other countries deny to them. They, therefore, have it in their power to establish a new, fair and firm commercial policy on the principles of free trade, as soon as they sincerely will it, and can thereby compel other countries to come to better terms with them. It is their true policy to hold out to other nations the offer of a truly reciprocal free trade.

It is one of the greatest blessings of free trade that it intimately connects the interests of the industrial people, who are interested in their mutual welfare, and that it consequently promotes the peace of the world as the necessary basis for industrial advancement and mental progress.

The internal intercourse of America as well as of England and of the Zollverein is as free as are the winds which sweep over their surface, and the waters which irrigate their valleys. The external interchange of their commodities, too, ought gradually to be made as free as the historical development of their industry and as their finances may permit. If any one wants an illustration of the advantages of free trade, he has only to look at the aspect of American internal commerce, and at the advances which are daily made, under its auspices, by the great Anglo-American Zollverein.<sup>1</sup>

<sup>1</sup> The Western World, by Alex. Mackay Esq. Vol. I. — J. L. Tellkamp, Beiträge zur Nationalökonomie und Handelspolitik, p. 179.



ATLANTIC OCEAN STEAMERS, AND REFORM OF THE  
PASSENGER ACTS.

WHATEVER importance a practical view of the establishment of steamers between the United States and the continent of Europe may possess, its value will be materially increased on considering its influence on civilization. Since the application of steam to purposes of navigation and locomotion affords greater facilities for the enlargement of our knowledge, by personal observation in distant lands, it becomes more and more evident, that the human mind gains clearness and variety of perception as it becomes familiar with different impressions of the world, and particularly of the genius and institutions of foreign nations. The history of civilization proves this assertion, and shows that intellectual progress has been most rapid and brilliant wherever intercourse with other countries was the most easy, as in the history of Greece. The aid of steam will extend the advantages of that intercourse to all parts of the world, and will, together with the improvements in education, accelerate the cause of civilization in a manner unknown in all past ages; for an acquaintance with the people, arts, and literature of a foreign country, excites the mind to a degree beyond calculation. We doubtless arrive at truth most readily, by an accurate perception of contrasts, and contrasts are necessarily great in the life and history of different nations. Upon the advancement of civilization are dependent the interests of industry, whose direction, to be profitable, must go hand in hand with the intelligence and taste of the most civilized people. No nation can be successful, in the

market of the world, which is not acquainted with the peculiar wants and tastes of other nations. Thus we find the mentally and materially useful united in one cyclus; and both equally favoured by the aid of direct steam navigation. The establishment of the Atlantic Ocean Steamers, frees the countries which they connect from the injurious effects of a monopolizing system of any other nation.

Steam-power, applied to navigation, has, like a Hercules, even from its infancy, performed marvellous deeds. By it, the United States are brought in so close a contact with the continent of Europe, that the statesmen and capitalists of both will become better acquainted, by personal observation, with those advantages which must flow from a more extended and friendly commercial intercourse, and from an assimilation of their commercial policy.

The cheap rate of postage, adopted by the Atlantic steamers, will concentrate almost the whole correspondence between the continents of Europe and America in these steamers, and will probably yield a liberal profit.

The high postage charged formerly upon American and European newspapers and more weighty monthly periodicals, if forwarded from continent to continent, worked practically as a prohibition of sale. The English press monopolized the news from both continents, communicated to both as much as it found convenient, and obliged them to look at each other through English eyes. This was, of course, not the best and most impartial way to become well acquainted with each other, and with their peculiar interests. If journals were sent by slow conveyance, they arrived at a time when they

had lost the attractions of novelty and interest. The whole press was, therefore, deeply interested in the success of the steamers. It is necessary to admit the periodicals in both continents free of duty and at a cheap rate of postage, which will lead to a speedy communication of the progress of science and literature, art and industry. Something has been done in this direction, but not yet enough.

The number of cabin passengers by the steamers is very considerable; the more so, since travelling itself increases with the improvement, safety, speed, and cheapness of facilities. Although the emigration of great numbers of valuable citizens is a serious loss to Germany and England, still the basis for friendly intercourse between the United States and those countries is thereby strengthened every year, which must result in closer commercial relations. For it is manifest, that the increasing millions of Germans or English in the United States would naturally be inclined to favour, by their political influence, such commercial policy as would insure equal advantages to their adopted, as well as to their mother country.

An important consideration is, that Atlantic Ocean steamers promote the industry of both continents, by giving the utmost extension to their *commercial interests*, and by securing markets for an extended sale of their produce. In so far as the commerce of the German states is concerned, we merely allude to a few known facts of the many which may claim consideration. The German states of the Zollverein have, as shown in the previous articles, a most liberal commercial system. This, in particular, operates favourably in regard to the United States, since Germany takes all their raw produce

at low rates of duty. Germany is already an extensive consumer of American articles, and it is unquestionable, that she will take a still greater amount of produce, if America will take more goods from her; or, in other words, the more goods she can sell in direct commerce to the United States, the greater quantity of American produce she will be enabled to take in return; which cannot be done by those countries which are obliged to favour their colonies. In her commercial policy towards the United States, Germany is able to act more liberally than some other European nations, since she is not encumbered with colonies, and can therefore give those advantages to the United States which other countries are compelled to extend merely to their colonies.

Manufactories of woollen cloths, linen, silks, and of many other articles which the United States do not produce in sufficient quantities, advance rapidly in Germany. German articles are as good as those of her neighbours. It is therefore the interest of the United States to treat her as favourably as any other country.

Although the alterations in the English corn laws deserve due praise, we ought not to overlook the fact that Sir Robert Peel retained the protective duties on all articles on which he still deemed it necessary. Sir Robert Peel's alterations have the appearance of great liberality, but they do not realize a more liberal commercial policy than that already existing in the German Zollverein. Since there are not, and never can exist, serious conflicting interests between the United States and Germany, they are likely to remain for ever at peace, so that the German ports will be always open to American ships.

The central position of Germany, being in the heart of Europe, is highly favourable for commerce, and especially for transito trade. The German navigable rivers, the Rhine, Weser, Oder, Vistula, Danube, &c., and the net of railroads intersecting, connect the commerce of the North Sea and the Baltic with the Adriatic, the Black Sea, and the Mediterranean, and with the nations east and west of Germany. A country thus geographically situated, is formed by nature for the utmost extention of the transito trade. Nothing can be more clear, than that it is the interest of all the German states, Austria included, not to levy any duty on the transito trade; for thousands of persons can gain by this business, if free and unmolested; whilst a high duty would only stand on the paper, and yield no revenue. A high transito duty would drive the goods from the German rivers and railroads, and those goods would be sent by sea, or through the neighbouring countries, if the freight should be cheaper than the freight and transito duty, direct through Germany. If this transito trade is not impeded by duties, it must necessarily enrich Germany in a similar manner as the inland trade on the rivers, canals, and railroads of New York, the most central American state, increases its industry and wealth. If all the German states will abstain from the levying of any transito duty on merchandise, and from the toll on their rivers, the transito trade of Germany not only, but industry and commerce in general, will gain increased and accelerated life, by the direct steam communication with the United States. All improvements, made in these respective countries, tend to benefit them mutually. A sound commercial policy

will always have to acknowledge that the commercial interests of England, the United States, and of the German states, should for ever go hand in hand. The benefits of such an increased intercourse are incalculable for the interests of industry. The great activity in correspondence, business and speculation, existing in the seaport cities, before and after the arrival of the Atlantic Ocean steamers, is sufficiently known, and renders it needless to dwell on the commercial importance of those steamers. But it may be especially remembered that peculiar advantages will result to those nations, whose ports they connect. Thus, for instance, the English are, by means of their numerous Atlantic steamers, enabled to execute orders in the shortest time, and to monopolize, in advance of all other nations, the market of the United States, with fancy articles, and generally, with those goods which contain much value in a small compass, which depend on fashion, and a speedy transmission of which is therefore desirable, before the market is overstocked from other quarters, leaving it to the latter to glut the markets by later arrivals. The profit is apparently with the English, who can at least partly monopolize this branch of the business by the steamers; and the loss is with the merchants of other nations.

But there is also a very dark and melancholy side to this picture, viz: the disasters of the Atlantic steamers<sup>1</sup>.

<sup>1</sup> Atlantic Ocean steamers lost:

- |                             |                  |
|-----------------------------|------------------|
| 1. President . . . . .      | Never heard of.  |
| 2. Columbia . . . . .       | All hands saved. |
| 3. Humboldt . . . . .       | All hands saved. |
| 4. City of Glasgow . . . .  | Never heard of.  |
| 5. City of Philadelphia . . | All hands saved. |
| 6. Franklin . . . . .       | All hands saved. |

The terrible catastrophe of the Hamburg Atlantic Mail Steamer *Austria* especially has recently drawn public attention to this painful subject, and has raised everywhere the question, how such awful events are to be avoided and guarded against?

The conveyance of passengers and goods by these steamers being a lucrative business, causes the *gain* of the ship-owners or of the members of the steam navigation companies to be their main aim; there exists consequently in the very nature of such a lucrative business the great danger, that gain may be preferred to the security and safety of the passengers, who entrust their lives and fortunes to those steamers. To obviate this danger, as much as possible, is the duty of government, whose principal end is the security of life and property of the people. The governments of all sea-faring nations ought therefore to institute a controlling power for the protection of their subjects in this respect, and to enact and to enforce laws prescribing re-imbursement of loss and penalty by the ship-owners in cases of negligence

7. Arctic . . . . .	322 lost, 87 saved.
8. Pacific . . . . .	Never heard of.
9. Lyonnais . . . . .	144 lost, 16 saved.
10. Tempest . . . . .	Never heard of.
11. San Francisco . . . .	240 lost, 460 saved.
12. Central America . . .	422 lost, 170 saved.
13. Austria (burned) . . .	530 lost, 67 saved.

It will be seen by this list that the loss of life in the *Austria* has been greater, than in any of the other steamers lost in the Atlantic.—On the 12th of Nov., 1849, the American packet ship Caleb Grimshaw took fire at sea, and burned until the 16th, when 339 of the passengers and crew were saved by Capt. Daniel Cook of the British bark Sarah, while sixty of the passengers, who left the vessel on a raft on the 13th, were lost.

or fault on their own part or that of the masters and mariners, they employ, so as to oblige them to exert all due care for the security of the passengers through the fear of indemnifications to be paid. Thus only can the end aimed at, that is *gain*, be directed to the proper regard of human life, which must be protected against the carelessness or coldheartedness of money-making enterprises. Fear of loss by indemnifications must curb the recklessness and cupidity of gain.

The increase of intercourse between distant countries in consequence of the application of steam-power to navigation, the great extent to which emigration has of late years been carried, and the recent disasters, suggest the propriety of enacting the necessary laws for the security of the conveyance of passengers. In September 1858, on the Hamburg Atlantic Steamer Austria more than five hundred persons lost their lives, while those few who were saved by the French bark Maurice, Capt. Rénaud, and the Norwegian bark Catarina, lost their property and were reduced to the greatest distress. This awful catastrophe was ascribed by the rescued passengers,—whose authentic narratives were published in the American newspapers, for instance in the New York Tribune of October 1st, 1858,—to the misconduct and the inefficiency of the officers and crew, and to the smoking the ship with tar, as the *cheapest* means of purifying the air, which caused the conflagration of the steamer, as the directors themselves were compelled to confess in the pamphlet published for their defence under the title “Austria.”

The fact is to be noticed that the directors refused to give compensation to the saved persons for their



lost property and to the relations of the deceased persons, although they had received ample insurance for the loss of the steamer, as the newspapers stated, and although by the Common German Law and by the English laws steamboat and railway companies are bound to make good any injuries sustained (through the fault of the companies or their servants) by persons travelling on the steamers or the railroads. The English and the French laws have already done much for this purpose; thus, for instance, by 53 George 3. c. 159, "An Act to limit the responsibility of ship-owners," it is enacted "that the ship-owners shall be liable to make good any loss or damage taking place by reason of any act, which may happen to any goods or other things put on board the ships, but not further than the *value* of the ship, and the freight due." In the value of the ship the insurance is included,<sup>1</sup> consequently also the insurance for the Austria.

Such a case as that of the Austria is sufficient to show the necessity of proper laws—similar to the English laws—in order to protect also the passengers on German ships.<sup>2</sup> The Prussian Minister of Justice, Mr. Simons, has kindly expressed to me his willingness to aid law-reforms in this respect.

The grave responsibility of the persons, to whose care and conduct the lives and property of hundreds of per-

<sup>1</sup> Pardessus n. 663. Code de commerce, art. 216. Loi du 14 Juin 1841. Prussian Code II. 8. § 1520—33 and 1576—78.

<sup>2</sup> I refer to Abbott, On the Law of Merchant Ships and Seamen, 7th edition, by W. Shee, pages 57 and 217—227; Appendix IX. Laws of Shipping and Insurance by Lees, pages 137, 257 and 518. Before Lord Campbell's Compensation Act passed, railway companies were bound to make good any injuries sustained (through

sons are entrusted on the ocean, renders it necessary that due care should be enforced by the government for the safety of all on board and for the security of the vessel.

Instead of building Leviathans, it might be less expensive for the companies, and more safe for the passengers, to send out two steamers at the same time and on the same journey, who can assist one another, as usually done by the governments on journeys of princely persons. The steamboat companies ought to take similar care for the great numbers of their fellow-men, travelling on their ships and trusting to them, so long as they possess a complete control of the management.

The principal objects further to be attained by the Passengers Act 5 and 6 Victoria c. 107, were the *seaworthiness* of the ship,—a due proportion between her tonnage and the number of her passengers,—the preservation of their health during the voyage,—an adequate supply of water and provisions for their use, and an adequate supply of boats, in proportion to the registered tonnage of the ship. The same Act prescribes, that before any ship shall be cleared out for her voyage, government officers shall see that the directions contained in the law be complied with, before the depar-

the fault of the companies or their servants) by persons travelling on the railway, but if death ensued, no compensation was payable. By Lord Campbell's Act, the compensation in case of death was made payable to the relations of the deceased person; this compensation is unlimited in amount, and it is calculated in proportion to the moneyloss sustained. The public hold fast to the strong inducement to good management, which they conceive to be afforded by the chance of a heavy pecuniary penalty in case of accident.

ture of such ship from any port in the United Kingdom is to be permitted. It has been proved, unhappily by the recurrence of disasters,—happening on ships of different nations, appalling to humanity, and too surely traced to evils which legislation might remove,—that if much good has been effected by the English enactments, much yet remains to be done there and in other countries, as above alluded to. But it seems, that in consequence of the English laws, the English steamers are comparatively the safest. I found them very good on my journeys to and from America.

Among the necessary reforms, the rules of salvage may be particularly mentioned. The compensation that is to be made to other persons by whose assistance a ship or its lading may be saved from impending peril, or recovered after actual loss, is known by the name of salvage, and at present is commonly made by a payment in money;—but it is strange, that if the preservation of life can be connected with the preservation of property, a Court of Admiralty will take notice of it, *but has no power of remunerating the mere preservation of life*, which must be left to private bounty.<sup>1</sup>

In order to remove this defect, it is very desirable that all civilized sea-faring nations should enact, that *a higher salvage shall be given for the preservation of human life out of the treasury of that state to which the persons saved may belong*, than the salvage for goods, which generally is a burden upon the owners who re-

<sup>1</sup> A Treatise of the law relative to Merchant Ships and Seamen, by Lord Tenterden, page 571.

ceive the benefit, and are mostly men of property, whereas shipwrecked people are very often poor, and unable to give the proper reward, which they certainly would be very willing to bestow upon their benefactors.

The terrible case of the *Austria* proved sufficiently the necessity of such a regulation. While a French and Norwegian ship came most nobly to her rescue, some vessels, which, as the rescued passengers say, were in sight of the burning steamer, went off without giving her aid. This fact shows that we cannot trust alone to the feelings of compassion as sufficient to induce heartless and selfish men to fulfil the duties of humanity. Such men must be induced to do by an appeal to their selfishness what else they would not do. If it were made generally known, that high rewards would be given for the preservation of human life, such men would hasten to aid and rescue persons from the perils of the sea, and many would be saved who may yet be lost.

It would be at least some consolation at the loss of so many countrymen—among whom I mourn a beloved nephew, Charles Trott,—if the melancholy catastrophe of the *Austria* would induce the legislators of civilized nations to enact laws for the better reward of those, who in future shall save the lives of their fellow-men from the dangers of the sea.

---

### III.

## MONEY AND BANKS.

---



## MONEY AND BANKS.

---

Aurum per medios ire satellites  
Et perrumpere amat saxa potentius  
Ictu fulmineo.

BEFORE treating a subject which has recently been the occasion of much *party* animosity, I would remind the reader that *science* knows no parties,—that it can adopt no opinions of a party except so far as that party has borrowed them from truth,—that *truth*, eternal, unchanging and complete, is its only end and aim. I request him to remember further that it is the province of the scientific inquirer to ascertain abstract and general principles rather than to teach how these principles are to be applied in particular cases, and that in this way he will sometimes reach conclusions for which the country in which he writes may not yet be ripe, and which he would be the last to recommend for immediate adoption. The writer may also add, by way of caution, that in this chapter he discusses questions only in their *financial* or *economical* aspects, and that many

considerations of a political nature,<sup>1</sup> which the statesman would be required to weigh before deciding on measures, must in this place, for the sake of simplicity, be omitted. He approaches the subject only as an *economist* who, for the time, knows nothing of general politics, who owes allegiance to no party, who would write only as a citizen of the world and who, far from assuming to have mastered the whole truth, is but a humble inquirer, yet ready as he proceeds to communicate to others the result of his impartial inquiries.<sup>2</sup>

#### FUNDAMENTAL PRINCIPLES.

*What is money? What is currency?*

The second of these questions can be understood only by defining the first.

By *money* we mean, 1st, a common *measure* of values, and, 2ndly, a *common medium of exchange* as a real equivalent of values, as a power of purchasing;—two functions intimately connected and yet admitting of separate examination.—

<sup>1</sup> In countries, where the acquisition of wealth is the prime object of the majority of the people, money power is one of the greatest and most difficult to guard against:

“The age of bargaining hath come,  
And noble name, and cultured land,  
Palace and park and vassal band,  
Are powerless to the notes of hand  
Of Rothschilds and the Barings.”

<sup>2</sup> I have written on the influence of banking upon politics in my treatise „Ueber die neuere Entwicklung des Bankwesens in Deutschland, pages 25—31, to which I refer. See also the interesting article of Judge Charles Daly at New York: “The ancient Feudal and modern Banking Systems,” in the Democratic Review Vol. II.



Considering money as a

*Measure of Value,*

we have to inquire what are the essential qualities of a good measure. They are that it be *invariable*, *easily ascertained*, and susceptible of division into parts. Money is to *value* what standard *weights* and *measures* are to *quantity*. The rights and interests of both, buyer and seller, require that the standard bushel, gallon, yard, &c., should be a *fixed and known* quantity, subject to no variations, easily verified and admitting of convenient subdivisions; so money which is considered for the present but a common or standard measure of value, should possess, as far as possible, the same properties. We say, as far as possible, because in the case of money as of all values absolute stability is unattainable. What we require, then, is that the measure of values adopted should approximate as nearly as possible to this *idea* of a perfect standard.

In modern times, both metals and paper have been adopted as a *measure* of value, and both have their advantages. The precious metals existing only in limited quantities and not liable to sudden increase or diminution, inasmuch as they are produced with great labour and are very enduring, have much the advantage in respect of *stability*. As the commercial intercourse of the ancient world was very limited, so much the greater and more sudden were the variations in the value of gold and silver. So now, the smaller the amount of the precious metals in a country, so much the more easily can great fluctuations in their value be produced by influx from without. The modern world

has attained to a far greater degree of *stability* in the relative value of the precious metals through the universality and rapidity of commercial transactions (which produce the niveau of values), and through the now immense aggregate of gold and silver in private use or in circulation. However sudden and great the influx of precious metals from newly discovered sources now may be, their values do not suddenly sink, because the increase, in comparison to the great masses in use, is but a small percentage, and hence makes itself felt only in a long series of years. While almost all other productions of human labour are sooner or later consumed, the precious metals are preserved, often under the most curious forms, and can be, at any time, melted up and coined, and thus as coins pass at once into circulation. Hence the precious metals, in whatever form they may be, are to be considered in their aggregate, and their present amount is the aggregate production of all lands and for thousands of years. The constant increase of this aggregate by new supplies has, however, had the natural effect of causing their value slowly to decrease when compared with the common necessities of life, with corn, for instance. This decline in the value of gold and silver is so slow as to be hardly perceptible in short periods of time; hence for such periods they may be considered as affording a stable measure of value; and yet if we compare their value at intervals, say of centuries, the decline is strikingly large. Thus taking corn as our standard of comparison and extending our inquiries only to England, France and Germany, we find that the value of gold and silver, during the period between the discovery of the mines of Mexico

and Peru and the beginning of the present century decreased from four to sixfold.<sup>1</sup>

If we now, with Adam Smith, consider corn as measure or standard of value, it follows that, as the medium or average price of that article has in the course of centuries risen, precisely in the same ratio or percentage the price or value of the precious metals has fallen. There is, however, a remarkable difference as to the production of corn and precious metals to be mentioned; viz: while the most productive mines determine the cost of production for the metals and cause the closing of those which are less productive, the least productive cornfields, whose crops are still demanded by a dense and rich population, determine the price of corn, the more productive yielding their owners a comparatively high ground-rent. Consequently in this respect the cases of the metals and corn are exactly reversed; the reason of this being the greater demand for corn as a necessary of life.

From the careful investigations, which have been recently made, in regard to the amount and relative value of precious metals, at different periods, we find the value of them, as circulating in commerce under the form of money, in Europe and its western colonies, to have been in the year

1492 about 250 millions of Prussian thalers.

1600 „ 1250 „ „ „ „

1700 „ 3250 „ „ „ „

The increase was then about one thousand millions

<sup>1</sup> A. v. Humboldt, *Deutsche Vierteljahrsschrift* von 1838, part 4, pages 15-17.

of thalers during the sixteenth century, and two thousand during the seventeenth.

The introduction of the process of treating the ores of silver with quicksilver (1580) increased greatly the production of that metal, and towards the close of the sixteenth century, there was consequently a rise in the prices of goods and merchandise, corresponding to the increase in the amount of money. Then followed a period of slight increase, lasting until the fall in the price of quicksilver (since 1778) when there was a rise in prices caused by the more systematic and extensive working of the Spanish silver mines, and a corresponding increase of their productiveness. During that period of slight increase, population, industry, commerce and, of course, the demand for the precious metals, had advanced almost in the same ratio, and the value of money had remained almost the same; but with the sudden increase in the productiveness of mines that value immediately fell again. The same facts are repeated in our own time as consequences of the immense discoveries of gold in California and Australia; with the additional circumstance of a great change in the relative worth of gold and silver,—a change likely to be felt still for a long time.

In round numbers the annual production of the precious metals may be estimated as follows:—

For the year	1500	at	1,000,000	thalers.
"	"	"	1550	" 4,000,000
"	"	"	1600	" 14,000,000
"	"	"	1650	" 22,000,000
"	"	"	1700	" 24,000,000
"	"	"	1750	" 46,000,000
"	"	"	1800	" 68,000,000

According to Alexander von Humboldt, in the above aggregates the *amount* of silver is about forty-five times that of the gold, while the *value* of the latter is but about fourteen or fifteen times that of the former; silver being a much more useful and necessary metal, and therefore in far greater demand. The production of the two metals as calculated for the year 1800 was about:

gold	20 $\frac{1}{2}$	millions of thalers,
silver	47 $\frac{1}{2}$	„ „ „
aggregate of both	68	millions of thalers.

Again according to Baron Humboldt<sup>1</sup> the New World produced at the beginning of this century annually:

17,000	kilogrammes of gold
800,000	„ „ silver.

The production is estimated to have been for the years

1842	of gold	43,000,000,	of silver	49,000,000	thalers;
1848	„ „	58,000,000,	„ „	50,000,000	„

Thus the production of gold was in 1848 nearly three times that of 1800; while that of silver had increased but a few millions. This inequality of production, vastly increased since the discoveries in California and Australia, as the metals pass from the mints, is felt at once in the money-markets.

The annual production for the last few years is calculated (in thalers)<sup>2</sup> as follows:—

<sup>1</sup> Essai Politique sur le Royaume de la Nouvelle Espagne. T. IV. page 218.

<sup>2</sup> André Cochut in the Revue des deux Mondes,—“On the Gold mines of Australia.” Deutsche Vierteljahrsschrift. 1856. Nr. 74, page 151. Minerva. July 1854. Vid. also J. D. Whitney. Ir. “On the Mineral Resources of the United States, &c.”

		Gold.	Silver.
For the year 1849	at	91,000,000,	52,500,000.
" "	"	1850 "	132,500,000,
" "	"	1851 "	159,500,000,
" "	"	1852 "	250,000,000,
" "	"	1853 "	266,000,000,

Or as Mr. Soetbeer of Hamburg estimates it:<sup>1</sup>

		Gold.	Silver.
For the year 1848	at	47,700,000,	45,000,000.
" "	"	1849 "	55,500,000,
" "	"	1850 "	119,900,000,
" "	"	1851 "	143,400,000,

These estimates, it is true, are but approximations to the truth, but they are sufficient to prove the vast augmentation of late years in the production of gold, and the great change in the relative value of that metal and silver. This ratio, formerly 16 to 1, and in North America, since 1792, 15 to 1, was reduced by Act of Congress, July 1853, to 14,45 to 1. In consequence of this reduction, the standard value of American silver coinage has been lowered to the amount of 7 per cent. This has led to the importation of a vast amount of silver in the form of French five franc pieces, which is re-issued in the form of American coins, giving the government, after deducting all the costs of transportation, insurance, and coinage, a clear profit of 4 per cent. This exportation of silver from France has already so reduced the supply of five franc pieces in silver, as to bring into circulation a new gold coin of the same value in which the value of the gold is fixed at 15½ times that of silver. The Bank of France makes its payments mostly in gold, and so gradually this metal has

<sup>1</sup> Die Banken, by Otto Hübner. Page 47.

become the measure of value in France, as heretofore in England and the United States of America. Compared with this standard, the prices of the necessities and luxuries of life are found to be rising slowly, as the amount of gold coins in circulation increases.

There is no certainty that the present ratio of gold to silver will long continue, especially if the rich productiveness of the gold mines of California and Australia does not fall off.

Even now, the payment in gold of debts formerly incurred in francs or dollars, that is under the old standard of silver, is a source of gain to the debtor,—and of consequent loss to the creditor,—of from 3 to 4 per centum; a change of value likely to increase.

All, consequently, are losers who made investments of their property before the recent influx of gold; for instance, capitalists interested in English life-insurance companies or such as formerly invested in France and North America, making their payments according to the standard of the silver, and now receiving their returns according to that of the gold dollar. Such only as may by chance obtain their returns in silver can escape this loss. But silver, no more than gold, can retain its old value when measured by the standard of other articles.

Finally we must note the fact that the great mass of paper money, in the form of bank-notes and so forth, tends to depress the value of the precious metals, by circulating in their stead,—by being used in payments, where else the metals would of necessity be used,—and thus consequently lessening the demand for them.

It follows from this course of reasoning, that there must ever be some fluctuation in the value of the pre-

cious metals. Their market values depend, like those of all other articles, upon the ratio between the demand and supply. Where they exist in quantities greater than is immediately needed either for currency or manufacturing purposes, they must decline in price; but as this decline causes them to be transferred almost immediately to other places where they are in greater demand, the depression is slight. The principal fluctuation is one which affects the whole world and results in part from the relative quantities mined in different periods and centuries,—in part from the variations in commerce and industry leading to a corresponding variation in the amounts needed for purposes of trade,—and in part from the different proportion of these metals which is worked up in the useful and ornamental arts. Thus the prices of gold and silver have gradually declined since the discovery of the American mines;<sup>1</sup> within a few years they had, on the other hand, increased on the continent of Europe, in consequence of the wear and tear, and the greater demand for plate, jewelry, &c.; while, at the present time, their prices have slightly again declined since the discovery of the gold mines in California and Australia. It will be seen, then, that the precious metals are by no means an invariable standard of value. Yet their natural scarcity, and the small increase in comparison with the existing amount of gold and silver, and the great amount of labour which has to be expended

<sup>1</sup> See A. von Humboldt, *Essai politique sur le Royaume de la Nouvelle Espagne*. T. IV. page 218, and A. von Humboldt, "Ueber die Schwankungen der Goldproduction, mit Rücksicht auf staatswirthschaftliche Probleme." (In the *Deutsche Vierteljahrs-Schrift* of 1838, part 4, pages 15-17.)



in their production, renders all fluctuations in their value extremely slow and gradual and thus fits them preeminently for a *measure*. Governments have by *coining* provided an accurate designation of their value as well as convenient subdivisions.

A bill of exchange or a check has in case of large values this advantage over metal and bank-notes that it is much more safe. A single *check* or *draft* is sufficient to exchange any value however large, and, when being payable only to order, it can be carried any distance, or be transmitted by mail, or even be lost, and yet the owner suffers no injury; but it has the inconvenience that he who pays and endorses it, is responsible for its value.

Bank-notes, on the other hand, are liable to such sudden and great fluctuation, according as those who emit them find it for their interest to expand or contract their issues, that the public have no safety except in such paper as is based on an equal value of the metals. In such case they are but a substitute for them, and convertible into them at pleasure. Such vast evils have resulted in America from irredeemable paper money that American *laws have made specie or metallic coins the only lawful tender in payment of debts*. The importance of this will be more fully seen when we come to consider money in regard to its second function as

### *A Medium of Exchange.*

It is evident that there can be no division of employments and of course no high civilization unless men can exchange with each other the surplus products of their labour. It is also evident that *barter* is a very

inconvenient mode of exchange, since it by no means follows that we always want the surplus produce of him who may want our surplus produce. Hence in every civilized country the need of something which can be exchanged at pleasure for any and every purchaseable object; a general medium through which each producer may deal with any other producer near or remote; a sort of universal language which, by establishing a ready communication between all classes of employments, shall incite each to new activity and a larger production of exchangeable value. No nation can subsist without such a medium:—even the Krees Indians, according to Captain Franklin, use beaver skins as their medium,—and in proportion as a nation advances in industry and civilization, in the same proportion will it seek a more perfect instrument of exchange, because with each step of its progress it feels more and more the importance of facility of exchange.

Now why is it that all nations, whether ancient or modern, have, as they have risen to the civilized state, invariably adopted as their medium the precious metals? Was it done by a general agreement, or by ascribing to these metals an imaginary worth? No,—but from the conviction that they possessed a real value: the result of labour, usefulness, and scarcity, and which made them proper equivalents of the objects for which they were exchanged. Let it not be supposed, because an exchanging medium is indispensable and because things of no intrinsic value, such as pieces of paper, would serve as well as metal to represent the properties exchanged, that therefore the former may be substituted for the latter:—wherever this has been attempted, as

in the assignats of France and the continental paper of America, experience has shown that the currency depreciates and at last becomes almost worthless. The reason is plain. The farmer or mechanic who parts with his articles for *money* which he may have to retain in his possession for some days or weeks, needs assurance that his money has an intrinsic or unchanging value. This assurance he cannot have unless the substance itself have such value or is certainly and easily convertible into one which has. Hence the use of grain, oxen, &c., as an exchanging medium, has been found objectionable on account of the difficulty of verifying their quality as well as quantity, and yet more on account of the fluctuations in value to which they are always liable. In the case of a medium having neither intrinsic value nor convertibility, the holder will always insist upon a premium for the risk which he incurs in taking it; this risk must increase as the bill is older, and thus there will be a decline in its value.<sup>1</sup>

We have insisted, above, upon the great necessity of employing as a *measure* money, which does not vary greatly in value. This is not less important when we consider money as an *exchanging medium*. It is by means of exchanges that those who are employed in production distribute among themselves their respective shares of the produced value; but this cannot be done on just and equal terms if we use a medium which has varied materially in value between the time that a contract was made and that in which it is to be fulfilled. If a man

<sup>1</sup> Checks and bills of London have often a premium value, because of their convenience as a medium. Capability of being used as *medium* will *add* to the value of a thing.

who contracts to pay or receive £100 six months hence is uncertain whether that sum may not increase or diminish in value by one fourth or one tenth before this period elapses, all business becomes unsafe, and will either be avoided or be prosecuted in the spirit of gambling. When engagements are made for a still longer period, as in the purchase of real estate, the evils are still greater. Nor are they confined to men in active life; men retired from business; widows, orphans &c., who live on the income of their estates, even incumbents of office who live on fixed salaries, and salaries which, with the saving spirit characteristic of most governments, will be even in times of common prices only sufficient for a decent subsistence, all these may by a sudden and artificial inflation of the currency and of prices be reduced to comparative indigence. Hence we see the importance of infusing a large proportion of coin into the exchanging medium or currency employed by any people.

On this point, however, let us beware of two errors. The one is that all exchanges can under any circumstances be made by means of gold and silver exclusively. Where very large sums are in question, such as are daily needed in the great bargains made on the exchange, bills and checks have long been substituted for the cumbrous loads of coin which could be counted and transferred only by the agency of a vast multitude of hands and with much loss of time. Here paper promises to pay, or checks come in as a labour-saving machine, and to advocate their discontinuance would be as unwise as to recommend the substitution of the old-fashioned spinning wheel and hand-loom in place of the self-acting

mule which enables one woman to do the work of eight hundred. Even in what are called hard money countries only a small proportion of exchanges,—such as those for necessaries of life, wages, &c.,—are made by means of coin.

On the other hand, we are not to infer, because the precious metals have hitherto formed so small a share of the whole circulating medium of some countries, that therefore specie would be entirely inadequate for the purpose. Were all engagements now pending cancelled or discharged, and had not the habits of some people become adjusted through a long course of years to an expanded currency,—in other words, were all the operations of business about to commence anew and were gold and silver to form our only medium of exchange, it is evident that prices would at once adjust themselves to the quantity of coin. The price of an article, which is but another name for its value estimated in the current medium of exchange, may as well be expressed by *one* as *five*. If *one* dollar of an unmixed specie currency will command as many necessaries and luxuries as could have been commanded by *five* dollars of a mixed medium, it is evident that in itself it is just as useful. It is incorrect, therefore, to say as is often done, that there is not enough metallic money on earth to measure and exchange the values which are employed in trade. The only effect of employing such a medium exclusively would be to advance its value greatly and thus enable a given amount of it to effect a much greater number of exchanges. It should also be remembered that in any case but a part of the exchanges over the world *are* consummated by means of

money of any kind. The surplus produce of different countries is exchanged by means of bills which circulate over the whole globe and supersede the use of gold and silver, except so far as inconsiderable balances may remain, while in the internal exchanges of every country, the use of money in the form of coin is to a great extent superseded by bills, drafts and checks.<sup>1</sup>

Let me add here that in the term exchanging or circulating medium we do not include the bills, drafts, &c., above-mentioned. Only such paper as has been issued with the sanction of government, and purports to be payable in specie on demand, fulfils the definition of money,—such are bank-notes.

We are now prepared to consider the proper function of bank-notes and paper money which are but one branch of the great system of credit which distinguishes and, as implying mutual fidelity and honour, signalizes modern industry and commerce.—

#### PAPER MONEY AND BANK-NOTES.

WHAT is paper money? What are its uses, and what the evils to which it is liable?

Paper money is a promise given by authority of the government, to pay a certain sum in metallic money, that thus all debts may be legally paid by means of it. Its value, therefore, depends upon its *convertibility*, i.e. upon the power which the holder has of replacing it at pleasure by an equal amount of gold or silver. Without this it would not be taken with confidence, and could not, therefore, long maintain its par value. It is evi-

<sup>1</sup> See "The System of the London Bankers' Clearances," by W. Tate.

dent that this money may be issued by the government, by incorporated companies, or by individuals. Government paper issued as the ordinary currency and without great caution usually proves to be a bubble. There has rarely been an instance in which it has been redeemed punctually and to its full nominal amount. Witness the issues of this sort made by the American colonies before the War of Independence, the continental money put forth during that war, the assignats of France issued in the revolution, and the currency of Russia and Austria almost always depreciated.

In former times governments defrauded their people, or taxed them in disguise by debasing the current coin. In modern times the same object is often effected by an issue of government paper. If it be asked why the government may not pledge a certain amount of capital for the redemption of its paper and keep its pledge, there are two answers: 1st, the duty of payment frequently devolves upon an administration different from that which contracted the obligation and in that case there is but a feeble sense of responsibility. This is especially the case under a government where economy is popular, taxation unpopular, and where the incumbent of office and perhaps a candidate prefers tarnishing the public credit to the right and honourable but unpopular alternative of imposing a tax.—2nd. Another reason is, that this capital thus pledged must be managed, and a vast deal of skill and economy is requisite in managing a redeemable paper currency; and of all managers, the agents of a government are the least thrifty and economical. Moreover, the government is very apt to ruin the credit of its own paper by ex-

cessive issues in times of emergency, and when the loss of credit is most disastrous. We conclude, therefore, that a government ought not to trust itself to be a banker or to issue paper money. •

Is money the only *medium* of exchange?—Only for the smaller exchanges.

Why is it required for such?—Because being made by those not in business, they require a medium which will command universal confidence.

What is such a medium?—Gold and silver or their representatives, *i.e.* paper convertible at sight.

Why use the representative (the bank-notes)?—Because, 1st, it is convenient,—2nd, saves interest on the coin which it replaces;—this is the case with all paper.

What dangers to be guarded against? 1st, excessive issues or loans,—2nd, sudden contractions or expansions,—3rd, insecurity.

#### BANKING.

THE functions are: deposit and discount. In this respect the subject of banking is distinct from issuing notes as currency. Any man or set of men may become depositors and lenders of money. They receive money, give credit or drafts,—and then drafts circulate. A function which does not properly belong to the business of banking to which we have now especial reference is that of *issuing notes as money*, and the obscurity which hangs around the subject results from the combination, which takes place in the banks, of these *three functions*; deposit, discount and issuing of money. It is as *issuers of paper money*, that the banks are chiefly open to crit-



icism. Let us consider them as *makers of money*. This is a high and delicate prerogative. We have melancholy evidence of the blight which its abuse may leave:—

1st. In its effects in multiplying contracts which in their effects prove fraudulent and oppressive, since being made on long terms they are made in an inflated and must be met in a collapsed currency.

2nd. In substituting a system of gambling transfer of property in place of such exchanges as grow out of a healthy and productive system of industry.

3rd. In demoralising men and thus unfitting them for being useful producers hereafter.

4th. In creating, when reaction comes, obstructions that block up all the channels of business, suspend exchange, and with exchange, the production to which it gives rise.

5th. In creating artificial prices that tempt to excessive production at home, and unlimited importations from abroad, while it prevents the exportation of our own products.

How guard against these evils and yet retain the advantages of the proper use of bank-notes?

1st. There should be only one issuer of bank-notes; and a complete separation between the issuing and the banking business should be effected.

2nd. The issues must be limited by the amount of the gold and silver in the issuing department.

3rd. The proceedings of the banks must be *open*.

4th. There must be a personal *unlimited* responsibility.

With these, public confidence can be maintained, as we shall try to explain in the following essay. Being main-

tained, all the advantages of credit can be secured and yet the terrible penalty, which we have had to pay, not be incurred.—

PLAN FOR REGULATING THE ISSUE OF BANK-NOTES, WITH  
REFERENCE TO SIR ROBERT PEEL'S BANK ACT OF 1844.

It is sufficiently known, that all the dangers and evils of bank-notes produced by the continual expansions and contractions, originate from the *over-issue*; that is, issuing to a greater amount than the capability of ever-ready redemption. All evils of paper money are therefore to be cured in this one common point—the issue. In order that the check against those evils which we wish to avoid before they take place, should be *preventive* rather than *corrective*, the checking remedy must exist in the nature of the issue itself. A sure check can only exist, if the *self-interest* of those issuing the paper obliges them always *carefully to confine their issues below their capabilities of redeeming, or, if the issue is not productive, of gain.*

There is no necessary connection between the issuing of notes and the business of banking. The two operations, although clearly distinct and different, are by those who find their account in a vicious system sedulously sought to be confounded.

The issue of notes for circulation, like the coining of money, properly belongs to the supreme authority of the state, and should, like the coinage, be entrusted and confined to a single issuer;—not granted to a number of competing banks. Moreover, no profits should

be allowed to accrue from the issue of notes, since this at once begets the tendency to over-issue, through the desire for, and opportunity of, making gain.

Cherishing these views, I proposed the following "Method for correcting the Currency" in an article published in the January number, 1842, of Hunt's Merchants' Magazine and Commercial Review in New York, vol. VI. page 65; I said there: "Upon the supposition that it be correct for Congress to direct the issue of paper, the following plan for the establishment of a national paper currency might perhaps be practicable.

*"Let a certain number of men of the highest respectability, who are entirely independent of the government, but under its control, and who shall have no interest in the quantity issued, be appointed to issue a certain amount of paper fixed by law; depending for its basis upon the credit of the government, and a fund derived from part of the proceeds of the public lands, by which, if necessary, it may be redeemed. These persons are to do no discounting—merely to make the issue. In order to avoid the danger of an over-issue, the amount should be decreed by Congress, always carefully confining its issues below capabilities of redeeming, at all times, as well in the urgent necessities of war, as in a state of peace and prosperity. The reputation of a national paper will depend upon the caution never to over-issue, and the promptitude of redeeming. Although the voice of speculators continually demands an abundant issue, yet Congress has in justice to restrict the issue within such limits as thereby to protect its own reputation against dishonour and distrust, and individual property and contracts against unjust fluctuations of value. - It must*

act on the principle, that no one can honestly transfer to another by paper the power of purchasing; which he himself does not possess.

"The men, who make the issue, should have no interest whatever in the quantity of paper issued; upon this condition only can we hope, that prudence and a due regard to their own and the country's honour, might operate as a check against an over-issue.

"Those men, thus appointed merely to make the issue, would not form a bank; since that one act exhausts the power placed in their hands, and no discounting could be done by them. *By keeping the issuing and discounting business entirely separate, we avoid the danger of continual expansions and contractions*, which, as we know by the unhappy experience of late years, has proved very disastrous to all solid business, to the just fulfilment of contracts, and to those persons who live on fixed salaries.

*"Those who are appointed for making the issue should make a full register of it, to be printed in the newspapers, which should specify the number of bills of each denomination issued, each bill of each denomination being numbered in order, 1, 2, 3, &c., so that by this means an over-issue could be discovered by any one holding any of the bills of the over-issue.* To avoid the danger of their issuing duplicates, all bills issued should be countersigned by the members of the issuing body and engrossed in their books.

"A part of the proceeds of the public lands would have formed an ever-ready fund for redemption, sustained moreover by the pledged credit of the United States; and since no expansion or contraction of paper could exist, this would stand so safely stable in value, that only

in the most extreme cases of danger to the country a redemption would be required: and such cases are rare in the United States, which are so seldom threatened with war. *By carefully limiting beforehand the amount within the means of ever-ready redemption, we shall solve that great problem with respect to a paper currency, which is, to discover that check whereby that evil which we wish to avoid may be arrested, before it takes place.*

"The danger of over-issue is best avoided by making a gradual issue. This paper would be the much desired medium of exchange throughout the whole United States."

These views will be found to coincide with those which Sir Robert Peel at a later period (May 6th, 1844) proposed in the British House of Commons, as the basis of a new system of banking. I give, for the sake of comparison, an extract from his speech,—hardly thinking it necessary to add, that I do not suppose that statesman knew of my article: I must, however, confess my gratification that the ideas of so eminent a man as Sir R. Peel upon the subject of banking, should correspond so fully with those I had previously published.

I have recently read the excellent treatise on "Metallic and Paper Money and Banks" by J. R. Mc'Culloch Esq., contributed to the "Encyclopædia Britannica," in the year 1858, and I have found there the statement, (p. 462) "that in dealing with the Bank of England, Sir Robert Peel adopted the proposal, previously made by Lord Overstone, for effecting a complete separation between the issuing and banking departments of that establishment, and giving the directors full liberty to manage the latter at discretion, while they should have no power whatever over the other. It is probable that Sir Robert

Peel profited by the suggestion of Lord Overstone referred to, since the latter made his proposal in his evidence before a committee of the House of Commons in the year 1840, as Mc'Culloch states.<sup>1</sup>

But Lord Overstone's ideas were utterly unknown to me when in America, and indeed since my return to

<sup>1</sup> Mr. Mc'Culloch says in the above-cited "Treatise on Metallic and Paper Money and Banks," page 462:—"It is right to state, that except in so far as he no doubt profited by the suggestion referred to, the measures adopted by Sir Robert Peel in 1844 and 1845 were entirely his own. And they will continue to be enduring monuments of the depth and clearness of his views, and of his administrative ability. This is a point in regard to which the evidence of Lord Overstone is quite decisive; and it is difficult to say, whether that evidence redounds more to his lordship's credit, or to that of the illustrious statesman whose claims to the gratitude of the country as the founder of a sound system of currency, he has so generously and successfully vindicated. "I," said Lord Overstone, "had no connection, political or social, with Sir Robert Peel. I never exchanged one word upon the subject of this Act with Sir Robert Peel in my life, neither directly nor indirectly. I knew nothing whatever of the provisions of this Act until they were laid before the public, and I am happy to state that, because I believe that what little weight may attach to my unbiassed conviction of the high merits of this Act, and the service which it has rendered to the public, may be diminished by the impression that I have something of personal vanity in this matter. I have no feeling whatever of the kind. The Act is entirely, so far as I know, the act of Sir Robert Peel, and the immortal gratitude of the country is due to him for the service rendered to it by the passing of that Act. He has never been properly appreciated, but year by year the character of that statesman upon this subject will be appreciated. By the Act of 1819, Sir Robert Peel placed the monetary system of the country upon an honest foundation, and he was exposed to great obloquy for having so done. By the Act of 1844, he has obtained ample and sufficient security that that honest foundation of our monetary system shall be effectually and permanently maintained. And no description can be writ-

Germany, until I found them recently in this Treatise of Mr. Mc'Culloch.—I arrived at my conclusions in 1842 through studying the defects of the American banking systems during my residence at New York; and it is, I repeat, in the highest degree interesting and satisfactory to me, that such éminent men as Sir Robert Peel and Lord Overstone arrived through their investigations in England at the same result. This coincidence of conclusions drawn from similar facts and observations in different countries, is certainly so strongly in favour of the truth of our common views, as to render them in some degree worthy the attention of the reader.

The extract of Sir Robert Peel's speech, which, as I said above, I quote for comparison's sake, is the following :

Sir Robert Peel spoke (May 6th, 1844):

"The practical measure which I have this night to propose, as the plan of Her Majesty's government, I shall now proceed to state. It appears to me to be of great importance that we should have *one bank of issue* in the metropolis—the Bank to continue to the end of its charter, but the business of the bank *to be divided into two separate and distinct departments; the bank of issue to be separated from the general banking business, with different books, accounts and officers.* That to the bank of issue shall be transferred the whole amount of bullion in the Bank of England. *That the issue hereafter shall be regulated upon two principles—first, upon the definite amount*

ten on his statue so honourable as that he restored our money to its just value in 1819, and secured for us the means of maintaining that just value in 1844. Honour be to his name."—(*Min. of Evidence*, p. 178, *Committee of 1857.*)

*of securities in its possession; and secondly, upon the amount of bullion in its possession. That beyond this it shall have no power to issue its notes.* The amount of fixed securities on which we propose the bank should issue notes, is £14,000,000; the whole of the remainder of the circulation to be issued exclusively on the foundation of bullion, which shall be issued in exchange for coin. *I propose that there shall be a periodical and a complete publication of the banking transactions made to the government.* I would propose to enact by law that there shall be returned to the government weekly accounts of the issues of notes, the amount of bullion in the bank, and an account of the fluctuations in the amount of bullion, and the amount of deposits. In short, that such accounts shall be returned in reference to every transaction in the Bank of England in the department of issue, and in that of banking; and that the government shall publish unreservedly and weekly the whole amount.—We propose that on every issue that takes place beyond the amount of £14,000,000, the profit of it shall belong exclusively to the state. The bank shall not be allowed to issue bank-notes for more than £14,000,000, without transferring the entire net profit of that portion of its issues to the use of the government. It is necessary to introduce some controlling check upon the bank.”—

The experience of late years has led me to some modifications of the plan, which I originally proposed in America, as above stated, for the regulation of the issue of bank-notes, and it now assumes the following form:—

1st. As the losses to the public from over-issue of banknotes far more than counterbalance any private



*gains, the issue of such paper shall be productive of no pecuniary advantage whatever to the issuer.*

2nd. The issue of bank-notes shall be strictly separated from the business of banking, as originally proposed; and

3rd, this issue of notes shall be placed in the hands of a Board of Issue, formed of men of the highest character and respectability, able to give ample bonds and security for the faithful discharge of their trust, entirely independent both of the government and of the people, yet under the immediate control of Parliament or Congress.

4th. *The single basis of the issues by this Board shall be in all cases gold and silver, in coin or in bullion actually deposited.*

5th. *The amount of the issues shall be determined and fixed by the amount of coin and bullion deposited; the value of the notes not to exceed in any case the value of the deposits, so that they may be at any time redeemed on demand. Thus the danger of over-issue is necessarily reduced to a nullity, since bank-notes would simply be a representative of values in the precious metals actually deposited in the banks—the amount of notes consequently varying with the amount of gold and silver on hand.*<sup>1</sup>

The real point of difference between my present and my former plan is this, that the basis of the issues shall be bullion alone; that (analogous to the Bank Act of Sir Robert Peel, of 1844) the so-called securities of state

<sup>1</sup> The total cost of issue of bank-notes by the Bank of England is about £100,000. But the Bank of England conducts its issues upon a too liberal scale. Probably, however, the Bank might find means, without injury to the public, of re-issuing her notes, or of otherwise reducing the cost of their circulation. The expense should be borne by the public.

shall not in any case take the place of bullion and be made the basis of an issue of bank paper. It seems clear that the debts of the state should not be a foundation for new debts of banks. The issue and circulation of paper money can never be secure until the idea of making a pecuniary profit out of this issue be quite given up. The only object which can of right be aimed at in its issue is the convenience of the public;—the profit of the issuer is nothing when compared with the advantage that the public would gain by perfect security in the value of the paper in circulation.

Although it may appear daring, I cannot omit to express an opinion contrary to the views of Mr. Mc'Culloch and Sir Robert Peel, though with all due and sincere regard for the high authority of these eminent men: viz., that the ability of the Bank of England at all times to redeem its notes in ready money, was not lessened by the circumstance, that its issues to the amount of £14,000,000 are not protected by deposits of gold and silver, but merely by £11,015,000 of government securities, which it has to claim from the public, and £3,000,000 in exchequer bills. It appears to me that in this arrangement too much stress is laid upon the gain, and less on the security, the securities bearing 3 per cent. interest, and affording at the same time another profit in the issue of the notes, by which the lucrative banking business is carried on, without the actual use of hard money. Sir Robert Peel said on this subject in the speech above quoted: "I have said that we intend to insist on the Bank of England being the department of issue,—that the amount of bank-notes shall be regulated partly in a fixed amount of security

and the rest upon bullion; the government propose that the amount of the security shall be £14,000,000. We propose to continue (as I see no advantage which could arise from making a change) the debt due by the government to the Bank of England,—we propose to continue the existing loan. I know no advantage which would accrue from the government paying off this debt, looking to the Bank as the central bank of issue. We propose that the sum of £11,000,000 due by the government, shall be considered as part of the security upon which the issues shall be effected. There will then remain £3,000,000 of exchequer bills, over which the Bank will have a control.”—Mr. McCulloch says on this point, page 463 of his treatise: “The notes of the Bank of England in circulation for some years previously to 1844 rarely amounted to twenty or sunk so low as sixteen millions. And such being the case, Sir Robert Peel was justified in assuming that the circulation of the Bank could not, in any ordinary condition of society, or under any mere commercial vicissitudes, be reduced below fourteen millions. And the Act of 1844 allows the Bank to issue this amount upon securities, of which the £11,015,000 she has lent to the public is the most important item.” And page 467: “There is not the smallest chance that, under ordinary circumstances, or in the absence of internal commotion or panic, the issue of bank-notes will ever be reduced so low as £14,000,000; and it is therefore quite enough for every purpose of security, that the notes above that limit should be issued on deposits of bullion.”

Mr. McCulloch argues that under ordinary circumstances the security is quite enough, but he can hardly

deny that under extraordinary circumstances it might not be sufficient, for he himself acknowledges in his account of the suspensions of the Bank Act, in the years 1847 and 1857, to how small an amount the deposits of the Bank of England decreased during those bank and commercial crises.<sup>1</sup> He ought, therefore, to acknowledge, that under uncommon circumstances those securities are hardly sufficient. It seems that Sir Robert Peel wished to change as little as possible in the existing arrangements, and that this is the excuse for this measure. For the following is to be remarked:—as the issue of notes to the amount of £14,000,000 is based not upon ready money, but upon the debt due by the government to the Bank, there is immediate danger both to the Bank and to the merchants, whenever in consequence of bad harvests, great importations, speculations or wars, a considerable part of the money and bullion is drawn from the Bank and sent abroad. In consequence of bad harvests, for instance, the amount of money in the Bank of England during the eighteen months from April 1838 to October 1839, sank from £10,126,000 to £2,525,000. And yet but a small amount in notes was at that time withdrawn from circulation.

## BANK OF ENGLAND.

	Circulation.	Cash on hand.
1838. April . .	£18,987,000 . .	£10,126,000.
„ October . .	19,259,000 . .	9,437,000.
„ December . .	18,462,000 . .	9,363,000.
1839. October . .	17,612,000 . .	2,525,000.
1840. „ . .	17,231,000 . .	4,145,000.

<sup>1</sup> Mr. Mc'Culloch's Treatise above quoted, page 468.

In such a condition, with so little cash capital in the Bank, the £14,000,000 public securities are of little use, except in case of the exchequer bills, for the purpose of exchanging readily notes for hard money. Mr. Mc'Culloch himself mentions in his account of the suspension of the Bank Act in the year 1857, the insufficient sum of money, viz. £1,462,153,<sup>1</sup> which the Bank then possessed, "whilst it was the general belief, that this inadequate reserve would be forthwith either much reduced or wholly swallowed up;" and he farther adds that the business of the Bank has been conducted of late years with great prudence. Now as the circulation of notes is in a sound state only when each note can be redeemed in hard money upon demand; and since the Bank did everything in its power, according to the testimony of Mr. Mc'Culloch, to act up to this principle of sound banking, it follows that it was out of her power,—that in those crises she could not redeem her notes by using those £11,000,000 of government indebtedness for that purpose. Such securities are not available in times of danger and necessity—the Bank can only redeem her circulation in coin, bullion, exchequer bills and by taking them in payment for bills discounted and bills of exchange.

If the plan above suggested—that no notes should be issued on securities, and that no profits should be made by the issue (the costs of which might be paid by the public,)—should be adopted and carried out, no further limitation by law would be necessary, and in all other respects the greatest freedom of banking, or

<sup>1</sup> Mr. Mc'Culloch's Treatise above quoted, page 468.

in other words, the freest competition in the real banking business, might be the result.

Suppose now all notes are withdrawn from circulation save these actual representatives of deposits of cash or bullion, which are issued at public cost, without profit to the issuers, simply for public convenience. The notes are necessarily equal in value to coin, *because* they actually represent it and are at any time redeemable in it; they are better than bills of exchange because they require no endorsement, and the holder subjects himself to no responsibility for their goodness; they are at once for an entire nation, what the girobanks are for their immediate neighbourhoods; they being more convenient to use than coin or bullion would generally be preferred; and hence, would not often be presented for redemption.

In short, the public would only be a gainer, for all danger of a "money crisis" would be at once removed. Commercial crises would of course still happen from time to time, but with less violence, since overtrading and the spirit of wild speculation could no longer be stimulated by banks of issue.

The Board of Issue would grant to all banks its notes in exchange for coin or bullion, to be used in their free banking business, just as is now the case in the department of issue of the Bank of England.

Commerce, in fact all business, would be facilitated and yet the greatest safety secured—a duty which the government owes to the people. It would be a safeguard against great fluctuations in prices, certainly against the high prices, which are merely artificial, and the work of speculators, induced thereto by the facility

with which they can at times draw funds from the banks as at present constituted. In other words, the consumer would have secured to him a greater power of purchasing,<sup>1</sup> that is, he would be wealthier.

Mr. Mc'Culloch and others lay much stress upon the fact, that the substitution of notes for coins is a device for the *economising* of currency and, a *source of profit* to the issuers,<sup>2</sup> but there is not so much saved by this device, as is lost from time to time to the people by repeated bank crises. The profit upon the issue of notes is moreover only a profit to the banking houses that issue them, the public does not participate in it. The banks give notes, which cost nothing but the expense of manufacturing, to the public in exchange for real values which it (the public) has first to produce by its industry. The public thus gives real values for mere pieces of paper, and farther more incurs the risk of loss, being without sufficient security in cases of bank crises. As to the economy of the present system, it depends but slightly upon the issues of notes; on the other hand it is effected mainly by bills of exchange, of which in the year 1846, as I was assured by Mr. Heath, then governor of the Bank of England, nearly £ 300,000,000 were in course, by the daily exchange of bills to the amount of several millions at the Clearing House, and by the transfer of accounts on the books of the Bank.<sup>3</sup>

<sup>1</sup> See Say, Cours complet d'économie politique pratique. Tome II. cap. 4.

<sup>2</sup> J. R. Mc'Culloch Esq. A Treatise on Metallic and Paper Money and Banks, pages 446 and 473.

<sup>3</sup> I take this opportunity of acknowledging my obligations to Mr. Heath, then governor of the Bank of England, and to Mr.

But though the economical advantages of notes be all their friends suppose, what are they to the disastrous results caused by over-issues, in the grand explosions, which surely follow the overtrading, and the spirit of hazardous speculation, which they beget? On this point I refer the reader to the account of the crises of 1745, 1792-93, 1797, 1814-16, 1825-26, 1837, 1847 and 1857 as contained in Mr. Mc'Culloch's treatise.<sup>1</sup> The reader will see, by reference to a former treatise of my own,<sup>2</sup> that the losses in America during the crisis of 1837, were estimated at \$200,000,000.

If we consider the extent of the American crisis of 1857, it is probable, that the losses have been at least of an equal amount. A New York paper counts the losses in the short period alone from the 1st of Aug. until the 20th of Octbr. 1857 at \$150,000,000. The London papers of Nov. 6th of that year say:—"The advices which arrived with the last steamer reach to the 24th of Octbr. Nine hundred bankruptcies with a loss of 90 millions of dollars have become known." A later communication from New York of Jan. 12th, printed in the *Schlesische Zeitung* of Febr. 4th, 1858, said, that the United States had during the crisis of 1857 about 5120 bankruptcies with debts to the amount of 299,811,000 dollars, of which probably the half would be paid. Although these ac-

W. D. Haggard, principal of the bullion department, to whom I was recommended by Baron Bunsen, then Prussian ambassador, for their kindness in showing me the Bank.

<sup>1</sup> J. R. Mc'Culloch Esq. *A Treatise on Metallic and Paper Money and Banks*. Pag. 456, 459, 460, 462, 467, 491, and 492.

<sup>2</sup> *Die neuere Entwicklung des Bankwesens in Deutschland, mit Hinweis auf dessen Vorbilder in England, Schottland und Nordamerika*, von J. L. Tellkamp. 1856.



counts are inexact, still they show that the loss to the public was tremendous. New York papers of Nov. 1857 stated that about 50,000 persons in that city were thrown out of employment, and had formed dangerous bank mobs, and that everywhere thousands of labourers were idle.

For these reasons, Mr. Buchanan, the president of the United States, condemned the American banking system in his message to Congress, of the 8th of Decbr. 1857, and said, that the first duty which banks owe to the public is to keep in their vaults a sufficient amount of gold and silver to insure the convertibility of their notes into coin at all times and under all circumstances.

The losses further, which the public in England has suffered during the last crisis of 1857, are calculated by the Times of the 21st to the 24th of Dec., of 1857, a paper usually well informed in money matters, at the enormous sum of £50,000,000. If we compare herewith the profit, which for instance the public makes by the issue of notes on the basis of the £14,000,000 of government securities or debts and which Sir Robert Peel calculated yearly at about £100,000 in his speech of May 6th, 1844, and which Mr. Mc'Culloch estimates at £127,000 yearly, page 207, and which may be considered as a gain to the public, all must confess that it is as nothing in comparison with the enormous losses, which the public has suffered by the bank crises which occur almost every ten years. We do not know the gain which the other banks make by the issue of notes, but the public makes evidently, and at all events, a losing business of this issue on the basis of government securities, gaining annually £100,000 to £127,000, that is, about a million pounds in ten years and losing £50,000,000 thereby

in the same time. The so-called economizing by means of this paper currency leads consequently to the very opposite, and appears, accurately viewed, not as a profit, but as a decided disadvantage.

Mr. Mc'Culloch is very right in saying (in the same Treatise, page 449):—

“A paper currency is not in a sound or wholesome state, unless—1st, each particular note or parcel of such currency be paid immediately on demand; and 2d, unless the whole currency vary in amount and value exactly as a metallic currency would do were the paper currency withdrawn and coins substituted in its stead. The last condition is quite as indispensable to the existence of a well established currency as the former; and it is one that cannot be realised otherwise than by confining the supply of paper to a *single* source.

“The issues of paper money should always be determined by the *exchange*, or rather by the *influx* and *efflux of bullion*, *increasing* when the latter is flowing into a country, and *decreasing* when it is being exported. And when the issue of paper is in the hands of a single body, a regard to its interests will make it regulate its amount with reference to this principle. But when the power to issue notes is vested in different bodies, some of which may be little, if at all, affected by variations of the exchange, this is no longer the case. And instances have repeatedly occurred of the country banks having increased their issues when the exchange was unfavourable and the currency redundant. Hence the plan of exacting securities is doubly defective, inasmuch as it neither insures the immediate conversion of notes into coin, nor prevents their over-issue.”

But if, according to the view of Mr. Mc'Culloch, the Bank of England shall limit the issue and circulation of notes, as soon as it is apparent that exchange is against the country, or rather that bullion is leaving it, I venture to draw attention to the fact, that the *cause of the efflux of bullion*, viz. the overtrading stimulated by abundant issues and the consequent imports of goods, has happened in *a previous period of time, which later continues to exercise its influence*, and that the management of the Bank is at a later period *not able* to remove this previous cause. The abundant issue of paper having a tendency to raise the price of goods, the latter would consequently be imported, and sold at high prices; and specie would be demanded for the paper, in order to be sent out of the country: and this would make a constant draft on the banks. It would therefore be happy if there could never exist a too abundant issue of notes. If my plan were adopted, and notes should only be issued in exchange for the precious metals, an over-abundance or over-issue could not take place, as the issue would regulate itself according to the known laws of demand and supply. If much gold was demanded, this would be exchanged for notes and vice versa; and there would always be as much gold in the vaults of the issuing institution as notes in circulation, and there would never be any occasion to suspend payment or to suspend any bank act; and all calamities connected with those suspensions would be avoided.

It seems to be an advantage of this plan that the issue would regulate itself by the exchange, whilst Mr. Mc'Culloch wishes that the issues should be *determined* by the exchange *by means of the Bank of England*; but

it ought not to be overlooked that a great discretionary power, not controled by any check, is hereby put into the hands of the managers of the bank to expand or to contract the issue, and consequently to exercise a great influence on the prices of all goods, a power full of temptation to use it for the interest of the issuer in order to buy and to sell with a sure profit, and not to use it for the general interest. This danger is fully avoided by my proposal.

Differing as I do on these points from the views of Mr. Mc'Culloch, I state that these are the only points of controversy, and that I have been happy to find that his views expressed in his treatise agree in most essential questions with those which I have published in my treatise on "*Die neuere Entwicklung des Bankwesens*" in the year 1856, and that this was the reason why I translated his treatise of 1858 into German. (The translation has just been published at Leipzig.) I hope that Mr. Mc'Culloch will regard my frank avowal of dissent on some questions as a testimony of the high esteem I feel towards him, being persuaded that so distinguished a gentleman and scholar will excuse the dissenting opinion of one who professes to be merely in search of truth.

Looking back to my proposed plan, I must openly say that I do not expect, that this arrangement, which is the most convenient and the least dangerous for the public, will soon be made; but it is rather probable, that we must still learn from very serious experience before the conclusion will be adopted, that the gain from issue must be given up, which, as experience shows, is the cause of all evil and of all losses of the public. But I hope, that perhaps at some later period at a new

revision of the Bank Act in England these views may receive some attention.

Formerly it was often asserted, that among the conditions upon which the creation of the currency could be granted was the *unlimited* individual liability of the issuing parties; and it is known that upon this condition the important function of the issue of notes has been committed to the banks of Scotland.

Mr. Logan says in his work "The Scottish Banker" page 6: "A royal charter cannot in principle confer privileges at variance with the laws of the land, which 'trading under a limited responsibility' to all intents and purposes is. An exemption from the ordinary liability of traders would expose the public to loss, in order that a few speculators might reap a benefit." And Mr. McCulloch states the facts, that "in 1793 and in 1825, when so many of the English country banks were swept off, there was not a single establishment in Scotland that gave way." We may account for much of this stability to the *unlimited responsibility* of the shareholders or partners of the Scottish banks, as furnishing to note-holders and to depositors increased protection against danger of ultimate loss. The experience of the Scottish banks is conclusive as to the beneficial nature of the results springing from the practical application of the principle of the unrestrained liability of individuals, as furnishing to the public a very strong guarantee against fraud; but the principle affords little or no security against those alternate expansions and contractions in the paper currency of a country, and those fluctuations in its real value or purchasing power which tend to give to all commercial undertakings a gambling

character; but which are inseparable from the issue, by *trading* associations, of paper substitutes for metallic money. The only infallible test of the soundness of any scheme of paper issues is to be found in the identity of the phenomena with those which would take place with a currency purely and exclusively metallic, and it is as *issuers of paper money* that the Scotch banks are chiefly open to criticism. In times of prosperity they push out their notes and credits to an undue extent, and are consequently compelled to diminish them as violently when circumstances alter,—thus inflicting on the public oscillations in the currency much more violent than could occur with a *metallic circulation*, or with paper regulated on sound principles. It is also notorious and not denied that in Scotland the use of gold is almost unknown. In the recent crisis two of the principal Scotch banks, the Western Bank and the City of Glasgow Bank, were compelled to stop payment, and their management displayed anything but ordinary skill and prudence. The suspension of the offending banks led to a run on some of the other banks. Large amounts of gold were carried from the Bank of England to Scotland, and this led to the suspension of the Act of 1844 in the year 1857. These facts show that the Scotch banking system cannot stand without the support of England, and that its issuing power is not without danger to the public.

But the American banks are still less fit to be entrusted with the power of issuing notes, which they actually possess. The Scotch banks are by far preferable to them. In order to show the truth of what has been said by examples, I shall compare the fundamental principle of the Scotch with the American banking system.

The decided superiority of the Scotch banking by unincorporated companies—each member of which is responsible, in his whole personal and real estate, for all the debts contracted by the company, consequently for the whole of paper issued—consists in this fact, that according to this system, self-interest operates as the desired check, and compels the bankers to confine their issues within the limits of ever-ready redemption, so as to avoid ruin. The interest of this system is, *a careful confinement or curtailment of the issue*; the interest of American banking, which has the privilege of trading under a limited responsibility, is, *the utmost expansion of the issue*, or in other words the *over-issue*—that very danger we wish to avoid: it contains in its principles therefore the germ of its destruction. The present American banks, as every one knows, issue in competition with other banks as much paper as possible, in order to make large profits during the time of specie payment, as well as during the time of suspension, when they also gain by the discounting of their notes done by their agents, since no evil accrues to themselves by their suspension, being by favour above the law, like sovereign princes. Over-issue and its too well-known consequences follow, therefore, necessarily from the very nature of this system; and since such is the case, they will ever follow, just so long as this system exists, no matter what legislative provisions may be made concerning them.<sup>1</sup>

<sup>1</sup> I here speak only of the comparative value of the systems, neither for nor against bankers and stockholders; what regards the latter—they, in some of the eastern states, as New York and Massachusetts, &c., deserve for their prudence, during the last years of difficulties, the highest praise: it is the system itself

In the present state of affairs in America, when banks that have made large dividends suspend specie payments, they do nothing to alleviate, but on the contrary break down their debtors, and they buy up their notes by agents at a discount, and thus continue to *profit* while the people *lose* by their suspension. Paper money, it is asserted, is a means of creating capital and of saving labour. If the labour performed in order to preserve the credit of the paper had been bestowed upon the digging of the ore and coining gold and silver, we should have a sufficient amount of a real, in the place of the present imaginary, exchanging medium, which is nothing but the representation of a quantity of goods in the country under bond and mortgage. Banks represent and circulate, but they do not create capital, and they act as stimulus. Justice is in fact perverted by the present banking system. The morality of the people, which is worth more than gold, is endangered, by the temptation of spending their earnings immediately, so long as this money, which seems to have no permanent value, is thus thrust into the hands of the poor labourers.

There is this difficulty in the way of a reformation: all stockholders, whatever may be the amount of their stock, receive from their present investments greater profits than they would do under a safer system. They

which prevails throughout the states, that is to be reformed. If *truth* should clash against the *interest* of some, they must blame truth, not me; or rather they must reconcile *their* interests with the true interests of the country. Truth and justice have always been, throughout all history, and seem ever to be, at war with the interests of those men who pervert the true condition of society to their advantage, against the interest of weaker people.



would therefore prefer the old system until compelled by the people to adopt a new one. The crisis will soon arrive when all paper money will be refused except at the specie value, and the people will unite in demanding a nearer approximation to the specie standard. No legislative enactments can afford an adequate remedy for the evils resulting from incorporated paper money banks; they cannot, surely, be sustained if the people will not take their notes for any thing but specie. The poor would be much more happy with a more steady currency, as the wages of common labour adapt themselves more slowly to the changes which happen in the value of money than the price of any other species of commodity. Moreover, the bills of broken banks are more apt to get into the hands of these unhappy people, owing to their ignorance of the value of paper and the condition of banks, and owing, also, to the fact that many heartless and cunning employers, who belong to the better educated class, who *have* the means of knowing these things, pay their poor labourers in the money of these banks, which they know beforehand are worth just nothing. If we put the question whether it would ever be possible to substitute in the United States for their 1400 banks of issue one single independent institution only for the issue of notes, we should feel inclined to negative this question, for it seems improbable that ever such a change could be made; but still the following reasons speak for such a plan:—

Strictly and juridically speaking, all the notes in circulation in the United States of America are illegal, void and of no value, since the constitution of the United States clearly declares them to be such; the

people could therefore strike upon the simple expedient,—as the only true regulator of their currency,—never to receive or to pay bank-notes.

The most important consideration with respect to the issue of notes in the United States would be its constitutionality.

According to the Constitution Art. I, Sect. 8, Congress has no right to create a bank of issue and discount; and this is very wise, for in a country like this, where the acquisition of wealth is the prime object of the majority of the people, and where, notwithstanding, there are but few individuals who possess sufficient to check or counteract the evil influence of a gigantic bank, money power is the greatest and most difficult of all to guard against; such a power, emanating from a United States Bank, would be the greatest power in the country, and would still have no constitutional check, and would therefore be greatly abused.

Instead of it the question is, whether it is possible for the general government to use the power granted to it in the Constitution, Art. I, Sect 8, 5; which is as follows—viz., “The Congress shall have power to *coin money, regulate the value thereof, &c.*” This gives to Congress the whole power to regulate the standard of value of money. It is still more evident that it was the intention of the framers of the Constitution that Congress alone should have the sole power, from Art. I, Sect. 10, where it is directly denied to the states in these words:—“*No state shall coin money, emit bills of credit, or make any thing but gold and silver a tender in payment of debts.*” Consequently, there shall either be no *issue* of notes at all, or it shall be under the sole

control of Congress, but certainly *without any discounting*, as a bank would not be constitutional. In this case, Congress shall be confined to the letter of the article of the Constitution, and only possess the power of coining and regulating the standard thereof. This opinion appears to be true, since the currency and the value of it is governed by the laws of exchange throughout the world. No government can regulate the currency in any other way than to fix a standard; and this can be best done with specie. As shown above, the *states* have no control over, nor any right to manufacture notes. For it is a known and settled principle that no one can transfer to another a right which he does not himself possess. "*Nemo plus juris in alium transferre potest quam quod ipse habet.*" Since no state can coin money, or emit bills of credit, (under which paper money is included,) can they make any thing but gold and silver a tender in payment of debts? No state has itself a right to make money, no matter whether gold, silver, or any other material, and therefore it cannot transfer this right to banks by charter, wherefore these charters are wholly unconstitutional. Upon the supposition, however, that it be correct for Congress to control the issue of notes, the plan proposed by me might perhaps be practicable. Congress alone would have the right and the power to prescribe how the issue of notes might be made by one issuing body, whilst all the charters of the state banks and their notes are wholly unconstitutional, and could be declared to be so. In order to avoid a crisis, their notes ought to be gradually exchanged for the precious metals.

With these remarks I conclude the discussion of the

main object of my article: I merely append some observations on another important subject intimately connected with the credit system, viz., the connection existing between the paper money system and the tariff. If, by an over-issue of paper money, in such countries as intend to use the tariff as a protection of their home industry, prices rise above their customary level, merchants will take advantage of it, on finding that they can import abundantly with profit, over and above the payment of duties, from foreign countries where no artificial paper system swells the prices to an equally unnatural extent. In that case the tariff operates no longer as a protection. If, for instance, prices rise forty or fifty per cent., which is no uncommon occurrence during an over-issue of paper money, and if those articles are protected by a duty of twenty per cent., the importer gains still a handsome profit, after having paid the duty; and the producer, for whose benefit the protection was intended, must sell his products with a loss, or cannot sell them at all, in the competition of the market. Therefore, where the tariff is intended as a protection, there also *the standard of value must be as stable as possible*. Strange it appears, that the same persons who are for a high tariff, frustrate the latter by their demand for an abundant issue of paper. If the producers understood rightly their own interest, they would not be in favour of such issuing; the speculators only can be in favour of the latter. In regard to the nature of the tariff itself, a *revenue* tariff, with a protection only of those branches of industry which are *natural* to the country, and as such are apt to acquire a sound flourishing state, seems to reconcile the conflicting interests. By *protection* is

not to be understood a duty equal to a prohibition,—for this would annihilate the idea of a *revenue*—but only such a duty, that the existing branches of industry can stand in competition, and may not be brought to ruin. A protecting duty ought only to be so high, that after its payment, some foreign goods can be imported; this preserves the stimulus of competition, which induces the producers to exert themselves. But to produce and call forth artificially branches of industry, and to form a class of manufacturing labourers, can certainly not be the policy for a country like America, holding out so strong inducements for investments in agriculture, where industry is surely and richly rewarded, without the sacrifice of health, and without the contaminating influences of a dense manufacturing population. The agriculturists—under which I include all who produce the raw material, the lords of their lands—are happier than the manufacturers and seem to be the very pride of the country. It is evidently for their advantage to purchase their articles for consumption as cheap as possible, and therefore it is for their interest to patronize free trade. With an increasing population and wealth, manufactories will naturally grow, as competition for labour will be abundantly added to the vast natural resources. But since all do not prefer the occupation of agriculturists, and since the natural inclination and talent ought to be consulted and regarded in such questions, and since some Americans, like the English, seem to desire the manufacturing business, the above-mentioned views in regard to a tariff seem to be demanded; but we must recollect, that whatever is done in the way of protection for the manufacturers, is a sacrifice to their advantage by the

whole people. The interests of the United States are in this respect very similar to those of the Zollverein, of whose tariff I have spoken in a previous article, to which I refer on this point.

I coincide, of course, with the truths of political economy, in regard to the subject of free trade; and consider therefore a revenue tariff as only justifiable, if the artificial condition, and policy of other countries, disturb not the practical application of those truths.

I conclude this essay with the remark, that I am entirely disinterested in my views, and have no wish to come within the sphere of political contention. I am simply desirous of contributing towards the full discussion of a few of the most important questions regarding the currency, now agitated in most countries.<sup>1</sup>

---

<sup>1</sup> For further explanations I refer to my treatise "Ueber die neuere Entwicklung des Bankwesens in Deutschland," and to my appendix to the translation of Mr. Mc'Culloch's Treatise on Metallic and Paper Money and Banks.

## IV.

### REFORM OF PUNISHMENTS AND PRISONS.

---





# REFORM OF PUNISHMENTS AND PRISONS.

---

THE INFLICTION OF PUNISHMENT BY SEPARATE IMPRISON-  
MENT IN ENGLAND, NORTH AMERICA AND FRANCE.

A REPORT OF A JOURNEY MADE BY ORDER OF HIS MAJESTY THE  
KING OF PRUSSIA.

---

## INTRODUCTION.

IN the following treatise, I communicate the results of my investigations on the infliction of punishment by separate imprisonment. It was incumbent upon me to report, as well respecting the more recent legislation in North America and England, touching the subject of separate confinement, as upon the penitentiaries in North America, England and France, which, by order of the Prussian government, I visited repeatedly during the six months from the beginning of July, to the last of December, 1846. The number of my own observations, and the facts communicated to me by persons of highest credibility, in the course of my visit, are so considerable, that I am under the necessity, in order to avoid trespassing too much upon the time and pa-

tience of the reader, to communicate, in a condensed form, only the most important results.<sup>1</sup>

The most important and leading questions which have engaged the attention of statesmen of different nations in regard to this subject, are the three following:

1st. What is the relative severity of separate confinement compared with that of other modes of imprisonment?

2ndly. To what duration, on medical grounds, should separate confinement be limited?

3rdly. After the expiration of the term of imprisonment, what is to be done with the criminal?

I shall limit the present communication to the discussion of the mode and manner in which these questions are answered in the above-named countries, and beg leave to refer to my former treatise upon the penitentiaries of North America and England, published in 1844.<sup>2</sup> To obviate the results here communicated, I have repeatedly examined a great number of prisons; have frequently attended the sessions of the courts in the United States, England and France, and have made myself familiarly acquainted with the administration of justice and the penal laws of those countries. I mention the following as the most important of the prisons which I have visited, some of them repeatedly, a few of them, however, but one time.

<sup>1</sup> The author takes this opportunity of acknowledging his obligations, while preparing this article, to a learned and valued friend, Jas. F. Chamberlain Esq., superintendent of the New York Institution for the Blind.

<sup>2</sup> Ueber die Besserungsgefängnisse in Nordamerika und England, von J. Louis Tellkamp, nebst Bemerkungen über den Gesundheitszustand, &c., von Dr. Theodor Tellkamp. Berlin 1844.

## I. PRISONS APPERTAINING TO THE SEPARATE SYSTEM.

A. IN North America: the state's prison at Philadelphia, in the State of Pennsylvania; the state's prison in Trenton, in the State of New Jersey; and the city prison in New York.

B. IN the United Kingdom of Great Britain, which contains already numerous prisons adapted to the system of separate confinement, capable of receiving thousands of prisoners: in Ireland, the new prison near Belfast; in Scotland, the prisons at Glasgow and Paisley; the general prison at Perth; the prison at Dundee, the new wing of which contains single cells; the prison at Edinburgh, the new wing of which is also adapted to separate confinement; in England the following new prisons, which are similar to the Pentonville prison, and are built after the plans of Colonel Jebb, surveyor-general of prisons, namely the jail at Liverpool, at Leeds (at that time unoccupied), at Wakefield, in Preston, in Reading, in Weedon, the Pentonville and Milbank prisons near London; and at Parkhurst, upon the Isle of Wight, the prison for boys, where each boy is kept during the first month in separate, and for the rest of his time in congregate confinement.

C. IN France: the prison for boys in the street La Roquette, in Paris, and the prison La Nouvelle Force, in the Faubourg St. Antoine.

## II. PRISONS APPERTAINING TO THE SILENT OR AUBURN SYSTEM.

A. IN the United States: the prisons at Sing Sing, Auburn, on Blackwell's Island, and the house of refuge for children in New York, in the State of New York.

B. In Great Britain: the borough prison in Liverpool, the house of refuge for boys, the old wing of the Edinburgh prison, the prisons in Hull, in Manchester, and the convict ships, *Justitia* and *Warrior*, on the Thames near Woolwich, upon which a modified silent system prevails. I had, besides, an opportunity to witness the embarkation for transportation of two hundred convicts from Millbank Penitentiary on board the ship *Pestongee-Bomongee*; and finally I visited in Paris, France, several old prisons in which neither the separate nor the silent system prevails, as for example, the prisons *La Conciergerie*, *La Prison de Clichy* for debtors, *St. Lazare* for females, *La Force* and *Madelouette*.

My examination of the American prisons was materially facilitated in consequence of an Act of the Legislature of the State of New York, passed May 8th, 1846, by which the supervision of all the prisons of the State was entrusted to the Prison Association of New York, established by myself and others in 1844. (Whose Corresponding Member I have now the honour to be.)

With respect to my repeated examinations of the English prisons, I would make thankful mention of the great favours I received through the kindness of the ambassador, Baron Bunsen. In consequence of his commendatory letters to the most intelligent and influential men, I was enabled to derive the greatest benefit from my visits to the courts, the prisons, the manufactories, the banks, &c. To Colonel Jebb, surveyor-general of prisons, Lord Denman, and Baron Parke, two of the most distinguished judges of England, and the physicians of Her Majesty the Queen Baron Brodie and Dr. Ferguson, members of the Board of Inspection of Pentonville, I would express my obligations for the can-

did and unreserved communication of their opinions and experience. For the anticipating and truly friendly reception vouchsafed me by these, by the Marquis of Ailsa, Lieut. Colon. S. Perceval, Mr. Teed, and many others, I hereby offer my most grateful acknowledgments.

In Paris, the prisons La Roquette and La Nouvelle Force, are alone interesting with respect to the subject in question. For the most important results of my investigations, I must designate the prisons of England, and I begin my communication, therefore, with these, and leave the others, as being of less relative importance, for subsequent consideration.

In connection with the medical opinions on the limit of the duration of separate confinement contained in this article, I beg leave to refer to a treatise by my brother, Dr. Theodor A. Tellkamp, of New York, on the infliction of imprisonment according to the ends of the criminal law, which, for its profoundness, and the depth of its physiological research, will commend itself to the thoughtful reader without any eulogy of my own.<sup>1</sup>

# I. WHAT IS THE RELATIVE SEVERITY OF SEPARATE CONFINEMENT COMPARED WITH OTHER MODES OF IMPRISONMENT?

## A. *Opinions of the English in regard to this question.*

SINCE the penitentiaries adapted to separate confinement that have been recently erected here and there in Germany, have been constructed after the model prison at Pentonville near London, and, especially, since the English improvements in the physical and moral treatment of prisoners may justly serve as examples; because,

<sup>1</sup> Vid. Kritische Zeitschrift für Rechtswissenschaft, vols. XXIII and XXIV.

in the prisons of England at first the silent system, afterwards separate confinement in connection with transportation, and now a careful and prudent combination of both obtains; and as we are there aided by a more lengthened experience in legislation, so it is proper that these should receive our most careful attention in the introduction of similar modes of punishment.

The experience gained in the United States, and the alterations and improvements recently introduced there, increase in many respects the results which were obtained in England.

Until now, the longest duration of separate imprisonment in all the prisons of Great Britain was limited to two years. Did the nature of the crime demand a severer penalty, transportation might follow imprisonment, or might, without the previous confinement, be made to continue during life. If the judge determined on separate imprisonment, the sentence was limited to a duration of one-third or one-fourth the former legal penalty. Two years of separate imprisonment were regarded as equivalent to seven years of transportation. The choice between the two modes of punishment was left to the judge. In England and America, as is known, the law fixes only the limits within which the judge may exercise his discretion, and leaves it to him, after the jury have pronounced their verdict, to mete out the punishment in accordance with the circumstance of each particular case. Thus, for example, the laws of the State of Pennsylvania, for the year 1829, entrusted it to the discretion of the judge to punish high treason with from three to six; forgery with from one to seven; robbery with from one to seven; horse-stealing with from one to four;

perjury with from one to five years of separate confinement. (The laws of Pennsylvania punish but a single crime, that of murder, with death.)

The opinion, founded upon experience, prevails in England and America, that the public safety requires the *certainty* of punishment as the consequence of crime; and that the uncertainty in the *degree* of punishment which the judge may, according to the circumstances, inflict, is of less importance. The possibility of the infliction of the severer penalty would have the desired effect in preventing crime. In England it has also been left to the judge to fix, in each particular case, the proper relation between separate imprisonment and other modes of confinement. In case the latter were exchanged for the former, the duration was limited to one-third or one-fourth the period. In both countries it is considered impossible to fix a correct measure of punishment according to the requirements of justice, which could be made mechanically to determine the relation of separate confinement to other modes of punishment. They are, therefore, decidedly of the opinion that this, within certain limits, should be left to the judge, who is able most safely to apply it according to the circumstances of each particular case. It is commonly remarked that this discretion may be entrusted to the judge, since only men are appointed to this dignity whose character and talents entitle them to confidence. In the course of my visits to the public judicial tribunals of England and the United States, I have observed that the measure of punishment meted out by the judge was in general so just, that it was easy to perceive the jury and the witnesses coincided with him in the sentence. The pub-

licity of the administration of justice evidently works as a practical discipline for the good of legal order.

In the longer terms of punishment, the change to a period of from six months to two years of separate imprisonment has had the desired effect, as I have been assured by the jurists of Ireland, Scotland and England equally. The dread of the people for a two years' term of separate confinement is so great, that many criminals prefer transportation for seven years. In the shorter terms, on the other hand, a higher minimum than that hitherto in practice in England seems necessary for the attainment of the object. The severity of separate confinement requires a certain duration in order to be felt. Its shortest continuance should be from three to six months, that the punishment may have a deterring as well as an improving effect. For minor offences, other, and not disgraceful, punishments should be imposed. I have found everywhere in Great Britain criminals in separate confinement who had been sentenced for a few days or weeks only, who were constantly returning to the prison, and had become regularly accustomed to the short periods of punishment by which their criminal lives were periodically interrupted, until at length, as repeated transgressors, they have to be more severely dealt with. Through the brief, but dishonouring imprisonment of a few days, the offender becomes accustomed to the prison life; the greater number of those thus disgraced, but not improved nor deterred from crime, find themselves shut out from honest employment, and driven again to their old practices. In England the judges punish slight offences at first with a few days, then with from ten to thirty days, next with a few months, and finally with



two years imprisonment, or transportation. According to the assurance of Mr. Stuart, formerly police magistrate of Edinburgh, at present chief keeper of the prison at Perth, one woman in Edinburgh had been imprisoned forty times, and another sixty times. Idleness is the ruling passion of almost all recommitted convicts. If separate confinement is to exercise a deterring as well as a bettering influence, it must continue at least for some months, and be connected with instruction and hard labour.

*B. Results hitherto attained in England from the System of Separate Confinement for a period of from one and a half to two years.*

THE results derived from experience in England, from the system of separate confinement in its largest application, that of two years, are in every respect favourable, both as regards the moral improvement of the criminal and his qualifications for useful employment, and are as follows:—

1st. Separate confinement guards the prisoners against mutual moral deterioration, and in general avoids this great evil of the older prisons more certainly than associated confinement. It has this effect, however, only when the prisoners themselves of their own will do not avail themselves of any possible modes of communication. Those susceptible of improvement, and such as are imprisoned for the first time, may guard themselves against the evil influences of others in case they have no intercourse with the occupants of the neighbouring cells. Depraved criminals, on the other hand, find, even in separate confinement, opportunity for mutual recognition and communication. (Compare my former work, page 39.) The matron of the common prison at

Perth in Scotland informed me that the former prisoners from Edinburgh and Glasgow acknowledged that they recognized each other perfectly, by their humming or singing in the chapel. And the keeper of the prison in Belfast, Ireland, told me that the communications of the prisoners in the chapel, notwithstanding the seats were constructed separately as at Pentonville, had become so frequent that the instruction was now given in the cells.

2ndly. When a sufficient number of good officers, chaplains, and instructors, are appointed, as is the case at the Pentonville prison, each prisoner may be treated according to his individual peculiarities. The intractable are thus, without resorting to corporeal punishment, rendered sufficiently docile; the reasonable ones may, through gentleness and judicious intercourse, be led to improvement. Under these circumstances, this mode of punishment loses its *monotonous mechanical* character, through which many prisoners at Trenton and at Philadelphia have suffered mentally, in consequence of the entire absence of instructors, or the want of a sufficient number of them. The construction of the requisite buildings, the necessary physical and mental care of the prisoners, demanding the appointment of a greater number of officers and instructors after the model of Pentonville, render this mode of punishment peculiarly expensive.

3rdly. It appears also that at Pentonville the attention paid to the moral improvement of the prisoners has been more successful than elsewhere; even there, however, very few have been benefited from the number,

a. Of *old* offenders, and

b. Of those younger convicts who, from *obstinate unwillingness*, take no interest in any kind of instruction

To this class belong chiefly those criminals who have been confined in other prisons, and do not believe that it can be the sincere aim of any one to promote their welfare; who regard society as their implacable enemy, and themselves as involved in necessary hostility with it.

c. Of the number of those who, from idleness or stupidity, make no progress.

These prisoners of the second and third classes usually suffer as much in separate imprisonment, as if they were in complete solitude.

These classes of prisoners are sent back from Pentonville to the prisons from whence they came, and their places filled with more promising subjects. The greater part of those who at Pentonville were regarded as susceptible of improvement, have, after their discharge, conducted well. All reports of the officers in Australia, where the prisoners from Pentonville were sent, and the accounts of the officers and physicians of the ships in which they were transported, coincide with the carefully written statement of the talented chaplain of the Pentonville prison, *Mr. Joseph Kingsmill*, in this, particularly, that the large majority of the prisoners discharged from that prison conducted themselves, as free labourers, orderly and industriously, and thus gave proofs of their improvement.

Notwithstanding the moral results of separate imprisonment, as realized in the Pentonville prison, are proportionally so very favourable, it is nevertheless in its effects upon the mental health of the prisoners so dubious, that the question, how the moral improvement of the convicts may be attained without endangering their

mental health, has become a problem to the English physicians and legislators. It has been decided in the following manner;—

*C. The more recent mode of inflicting punishment by Separate Imprisonment in England.*

IN the recent English bill respecting the infliction of separate confinement, which during the session of Parliament of 1845 was presented for consideration, a *combined* system was proposed, embracing at first, separate, and afterwards associated imprisonment. As the English criminal colonies are at present in so unfavourable a condition, that it is deemed expedient for a time to give up the transportation of male convicts, for whom the Pentonville prison served as an improving preparatory school, so in England, as well as here, the problem is now to be solved, in what manner the system of separate confinement shall be made to harmonize with the existing criminal law, and the criminals pass the period of their confinement at home. The enactment in England respecting the infliction of separate confinement elaborated by Sir George Grey, than secretary of state for the Home Department, assisted as is said by Colonel Jebb, surveyor-general of prisons, asserts the *moral* influence of this mode of punishment to be so favourable that it is intended to make the system general; modified nevertheless out of regard for the *health* of the convicts, so that *the period of separate confinement shall not exceed eighteen months*; that it shall not amount in the average to more than a year, and that afterwards, in case of longer imprisonment, *associated labour* by day under injunction of silence, and *separation at night* shall supervene.

For confinement of longer duration a system was agitated in England, similar to that which I have proposed in my treatise upon penitentiaries, published in 1844, page 162 to 166.

Separate imprisonment is, at first, to be general, but the physicians and officers of the prisons shall transfer to associated imprisonment such convicts as are injured thereby, before the expiration of the eighteen months. In the separate imprisonment, *hard labour* shall constitute the rule, so as to render the punishment, notwithstanding the brevity of its duration, *detering* in its effect. The opinion prevails, that imprisonment at Pentonville, although dubious for the health, does not exert a deterring influence upon the criminals. After the prisoners in their separate confinement, by religious and other instruction, and hard labour, are accustomed to a more considerate, orderly and industrious life than was the case in the old prisons, they are to be employed in the second division, *together*, upon the docks, the public buildings, and in the houses of industry. They are to receive compensation for their labour, above that which is required for their support, which is to be kept for them in savings banks. The government is to add to such savings a proportional amount, to enable the criminal after his discharge, either to emigrate or to undertake some useful employment at home. Those susceptible of improvement will thus be furnished with a stimulus to good conduct,—at the same time it is considered as expedient to operate upon the more depraved through fear, and to threaten the incorrigible at their discharge, in case of a new offence, with transportation for life to Tasman or Norfolk islands. Accord-

ing to the opinions expressed by some English statesmen, it is to be inferred that the incorrigible will be subjected to this punishment, as soon as the lack of criminal colonies is removed.

The reasons, which in England have led to the limitation of separate confinement, are:—

1st. The physicians declare a longer continuance of it prejudicial to health.

2ndly. Statesmen and chaplains of prisons entertain the belief, founded upon experience, that the moral improving influence of the instruction imparted, operates favourably only when the prisoner has not become languid from confinement, on which account a duration of from six to eighteen months is advisable. With this duration the excellent instructors and chaplains at Pentonville have effected much good. This prison deserves credit in this, as well as in every other respect, for its superiority.

In my publication already quoted, page 128, I have expressed myself at length upon this subject, and I would also refer to the detailed communication upon this point, in the interesting account of Prince Byron of Curland, upon “the new prison systems.”

3rdly. Experience has there shown, that separate imprisonment is not equal in its operation as was at first supposed, but that in different prisons, and under different officers, it is productive of very different results; and that it admits therefore of a very limited average duration, in order that the consequences may not be too prejudicial to the health in circumstances where unfavourable modifications exist.

4thly. The mode of building, and the necessary

physical and mental care, consequent upon separate imprisonment upon the model of Pentonville, is regarded in England as too expensive to be applied to all criminals for a period of many years. (The yearly expenditure for 500 prisoners in Pentonville, according to the 4th and 5th reports of the Institution for 1846 and 1847, amounts to something over £16,000, without reckoning the interest of the capital expended in the buildings.)

5thly. It is feared that an English jury would hesitate to pronounce the verdict of "guilty," if a longer period of separate imprisonment might be inflicted; for experience, during the time that the old English law was in force, which visited minor offences with heavy penalties, has shown that when the law or its administration is, according to public opinion, too severe, the jury by a verdict of "not guilty" in conflict with their duty, prefer committing perjury to cruelty, until legislation, recognizing the fact, ameliorates the law or its administration. The jury, in this way, causes penal legislation in its reforms to keep pace with the sense of justice of the people.

While the English people, whose regard for the law is well known, through one of its organs, the jury, thus compels the amelioration of her superannuated penal laws, the participation of the citizens, in the duty of jurors, diffuses a lively interest in the maintenance of good laws among the whole people. A general respect for the law is the surest safeguard of government. The regard which the English legislators have for the jury in their proposed legal enactments, is, therefore, easily explained. The above remarks may suffice for the explanation of the fifth division.

Only after publicity in the administration of justice has been introduced, the trial hastened, and the custody connected therewith shortened, so as to be less hazardous to the health, can separate confinement, in case it is adopted, be applied without endangering the health of the prisoner.

*D. Is Separate Confinement equal in its operation?*

It has hitherto been generally assumed that separate confinement was entirely equal in its operation, and afforded, therefore, a general and safe measure of punishment. This assumption has not, however, been confirmed in practice. With respect to the material differences in the operation of separate confinement, which obtain in the American prisons at Philadelphia, Pittsburg and Trenton, according to the peculiarities of the buildings, the officers, the presence or absence of court-yards, &c., I have already expressed myself in detail in my work before cited. In England, where the Pentonville prison serves as a model, it has been supposed that separate confinement in all prisons similarly constructed would partake of the same character. A very great inequality, notwithstanding, prevails. The Pentonville prison, however, as a model institution, so far excels all the other prisons of the kingdom, as well in the character of its officers as in the careful and expensive physical and mental treatment of the prisoners, that I have seen no other which could be compared with it. The officers of other prisons themselves directed my attention to many points of difference. To this we must add that the young, docile and healthy prisoners, who were sent from other prisons to Pentonville, entertained the hope



that being afterwards transported to New Holland, they should be free, and thus avoid from seven to ten years of their banishment in case they conducted themselves well at Pentonville. This hope served to keep up their spirits better than would have been the case elsewhere and caused them to feel the confinement less sensibly. Other prisons did not afford them this hope. While the advantages of Pentonville as a preparatory school for a criminal colony should be duly acknowledged, it must not be overlooked that for Germany, which possesses no similar colony, Pentonville is less instructive than many other English prisons, in which the prisoners pass the whole of their confinement, at most but two years. The prisons at Belfast in Ireland, at Perth in Scotland, and at Liverpool and Preston in England may serve to illustrate this remark.

Mr. John Forbes, the superintendent of the prison at Belfast, informed me that the Irishmen, sentenced to two years of separate confinement, generally declared that they would have preferred transportation for seven years. It is evident that those upon whom the punishment is inflicted, are better able to judge of its relative severity than those who have not to suffer. In my conversation with some twenty-five convicts, I found that among the Irishmen, with whom feeling, wit, and sociability prevail, this punishment bore more heavily than upon the taciturn Englishman or American, with whom the understanding predominates. All the criminals with whom I conversed in Belfast, complained of the severity of their punishment more than the criminals in other prisons. This is the case, although the prison at Belfast is one of the best that I have seen. The influence

of the punishment upon the Irishman seems to be especially terrifying. As to the improvement derived from the system, it was difficult, from the brief period of its application there, to judge. Certain well-known thieves had, since the opening of the prison, left the district, so as to escape the penalty of separate imprisonment.

Among the Scottish prisons I select the general prison at Perth as the most instructive for us. All the criminals in Scotland sentenced to a year's confinement, or less, spend the period of their custody in the county prisons; the men, women, and youths, sentenced to longer periods, up to two years, are consigned to the general prison of Scotland at Perth. I found there in September, 1846, 323 prisoners, 228 males and 95 females. This prison is older than the one at Pentonville, and has not, therefore, many of the more recent improvements of the latter. Separate confinement prevails, the prisoners are employed in various mechanical pursuits, and receive a portion of the proceeds above a certain amount; have instruction in religion, reading, writing, and arithmetic; take daily exercise in the courtyard, and are visited daily by the officers and instructors of the prison. Although the domestic arrangements are similar to those at Pentonville, and although the overseer, Mr. Stuart, and the matron, Mrs. Millan, are excellent people, still, according to their own acknowledgment, separate imprisonment is heavier there than at Pentonville. In the otherwise excellent prison at Glasgow, almost every prisoner complained for similar reasons. These lie in the longer continuance of the punishment and the severity of the Scotch character,

on account of which the treatment on the part of the overseers is less mild than in Pentonville, or at Philadelphia (the dungeon and the handcuff were not unfrequently used at Perth); in the discouraging prospect of employment after release, since it is almost impossible in over-peopled Scotland for discharged and disgraced convicts to find employment; and also in the spare diet of the prison, oatmeal and the like, which is common in Scotland. As the poor people in Scotland live more frugally than in England, so this circumstance exerts an influence upon the prison diet. On the other hand, the care bestowed upon good nourishment at Philadelphia and Pentonville, according to their experience rendered necessary by separate imprisonment, I have partly set forth in my former work, page 127, and shall take occasion to mention again. These circumstances in connection with the milder treatment at Pentonville, the effect of which the prisoner daily feels, makes the relative severity of punishment at Pentonville and Perth very unequal, although the domestic arrangements in both are nearly the same. I conversed on different days in Perth with some 70 prisoners, men, women, and boys. All declared the punishment very severe, and so deterring in its character that they would certainly endeavour not to return to this prison if employment was afforded them after their release. A prisoner of herculean frame, labouring at the pump, of whom I enquired whether he had chosen that same labour, answered, that he had, and that it was not so severe as the oppressive uniformity of the cell. Certain of the prisoners there regarded the prospect of the criminals at Pentonville, for freedom and wages in New Holland, as highly en-

viable, while it would be infinitely difficult for them in Scotland, as released convicts, to obtain a living. This also the officers confirmed.

In the English prisons at Liverpool and at Preston, a great inequality in the operation of separate imprisonment prevails. The governors of both, Mr. Gibbs, at Liverpool, and Lieutenant Colonel Martin, at Preston, formerly officers, are men of education and capability. In each prison, I found at my visit a new wing with separate cells in which the so called separate system prevailed, while in the rest of the prison the silent system was in force. Both so-called systems, or rather modes of punishment, are carried into effect humanely in both institutions. Notwithstanding the punishment of separate imprisonment was more severe and deterring at Preston, since the governor there had introduced strict military discipline, while at Liverpool the punishment was administered as at Pentonville. The strict military discipline at Preston exerts so deterring an influence, that there are there very few relapses. On the other hand, the moral improvement of the criminal is not an object. The governor himself said to me, "my discipline vexes them in so many little points, that these roaming fellows get heartily sick of it." To this should be added, that the nourishment at Liverpool was rather better. For the rest, there prevailed in both institutions equal order and cleanliness; as indeed a high degree of cleanliness and much humanity exists in all the English prisons. The differences above mentioned, make the same punishment very unequal in the two institutions, and I may say in general, that among many prisons I have not found two in which separate

imprisonment was entirely equal in its operation. According to the experience hitherto attained, therefore, there is no exact, but only an average measure for the relation between separate confinement and other modes of punishment; and the English rule, founded upon experience, by which the other modes of confinement are divided by these, and the duration of separate imprisonment regulated accordingly, seems on the whole to give a very fair proportion.

II. TO WHAT DURATION (ON MEDICAL GROUNDS) SHOULD SEPARATE CONFINEMENT BE LIMITED.

THE so-called separate system was elaborated and applied in Philadelphia, without the council of medical men; only afterwards had they an opportunity to become conversant with it. In my repeated visits to the prisons of Great Britain, I have found in conversation, that all the superintendents expressed the opinion unanimously as the result of their observation and experience, that a duration of two years of separate confinement was the utmost limit of this mode of punishment which they could sanction; that even this period had been so perilous to the mental health of the convicts, that they could not give their voices for a longer extension of it; and certain members of the board of directors of the Pentonville prison, have expressed serious doubts as to the propriety of extending the duration of this mode of punishment. I felt myself, therefore, under the necessity, as this question can only be decided by medical men, and such officers as are capable from their position to judge of the results from practice and not from theory alone, to address letters to the most ce-

celebrated physicians among the board of directors at Pentonville, Sir Benj. C. Brodie and Dr. Ferguson, physicians to the Queen of England; and to Colonel Jebb, general director of all the prison buildings of Great Britain, and member of the board of directors of the prison at Pentonville, and with whom I had become acquainted, to ascertain their views as to the proper duration of separate imprisonment compatible with health. These gentlemen have consented to the publication of the following letters:

*"London, Nov. 11th, 1846.*

GENTLEMEN,—Visiting by order of His Majesty the King of Prussia the prisons of this country, I take the liberty of asking the favour of your opinion on the period during which separate imprisonment, as a general system, can be applied without the fear of injury to the bodily and mental health of the convicts?

Your distinguished position as medical gentlemen in the board of commissioners for the government of Pentonville prison, and your great experience on this subject, render your opinion most valuable for every country where the separate system is to be introduced and the criminal code to be modified accordingly.

I have the honour to be, with great respect, gentlemen, your obedient servant,

J. L. TELLKAMPF.

*To Sir Benjamin Brodie and Dr. Ferguson."*

*A. Medical Opinion of Sir Benjamin Brodie and Dr. Ferguson respecting the duration of Separate Imprisonment.*

(Reply.)

*"London, Novbr. 21st, 1846.*

DEAR SIR,—From the experience which the Pentonville prison has afforded us, we are led to the conclusion that the system of separate confinement may be conducted during a period of eighteen months without injury to the bodily health of the convicts. Indeed we have no reason to believe that among those who have been, or still are, confined at Pentonville, there has been a larger amount of illness than would have existed among the same number of individuals of the same age and of the same previous habits, if placed under other circumstances.

It appears to us that, if this system exercise any kind of deleterious influence, it is on the mental, rather than on the physical condition of the convicts. Nevertheless the proportion of those who have suffered in this manner since the expiration of the first year after the prison was opened, has been very small; and our opinion is, that, under a careful management, founded on the experience which has been now attained, there are very few individuals, who may not very safely be made the subjects of separate confinement during a period of eighteen months.

We have had no opportunity of observing the operation of the system during a much longer period than this; but from our general knowledge of the animal economy, we are inclined to doubt whether either the physical or mental health of the convicts could be main-

tained if the time of separate confinement were indefinitely prolonged, or if the spirits were not supported by the prospect of a change after a certain number of months.

We are, dear Sir, yours faithfully,

B. C. BRODIE,

ROBERT FERGUSON, M.D."

*Professor Tellkampff.*

On account of the short continuance of separate confinement at Pentonville; the careful selection of the healthiest convicts from the Milbank depot, for this institution; on account of the alternation between labour and properly directed instruction; on account of the sufficient exercise and healthy nourishment, and especially on account of the most careful medical attendance and mild treatment of the convicts in Pentonville prison, proportionally few of them have suffered in their mental health. According to the 5th report of this institution, page 31, of about one thousand criminals who have been confined there during the four years since its establishment, five have become insane, and twelve have been affected with delusions.

To the distinguished Major, now Colonel Jebb, of the Royal Engineer Corps, Surveyor General of Prisons, justly celebrated for his able writings and his construction of prisons; and whose intercourse was very instructive to me, I directed in October, 1846, the following letter:

"DEAR SIR,—Being commissioned by His Majesty, the King of Prussia, to examine the prisons of Great Britain, I would ask the favour of your opinion on the



result of separate imprisonment in this country; the period during which it can be safely enforced, and the mode in which it may be applied as a general system.

Your distinguished situation as Surveyor General of Prisons, and as commissioner for the government of Pentonville prison; your various publications, and your plans on which all the new prisons of Great Britain are built, entitle me to consider you as most intimately acquainted with all the peculiarities and the working of the separate system: I have, therefore, taken the liberty of submitting to you the above questions.

I have the honour to be, dear Sir,

Your most ob't servant,

J. L. TELLKAMPF.

*Major Jebb, Royal Engineer,  
Surveyor General of Prisons."*

To which Colonel Jebb had the goodness to send me the following detailed reply:—

*B. Opinion of the Surveyor General of the English Prisons, Major Jebb, respecting the limits of the duration of Separate Imprisonment.*

"45, Parliament st., 1st Novbr. 1846.

SIR,—I have received your letter acquainting me with the objects that have brought you to London, and requesting that I will give you my opinion on the results of separate confinement in this country, the period during which it can be enforced, and any information I can afford as to the mode in which it can be applied as a general system. The subject of prison discipline is of so much importance and, at this time, engages so much of public attention, that I at first hesitated to

enter upon it, but feeling assured from the spirit in which you pursue your inquiries that you will apply every information you may obtain in furtherance of establishing a sound system, founded on experience rather than theory, I do not feel justified in withholding any opinions which the opportunities I have had, have enabled me to form.

The nature and particulars of the discipline enforced at Pentonville, the general results which have attended it, during nearly four years, would be best obtained from the reports of the Board of Commissioners to which I have the honour to belong. My own individual opinion is recorded in the enclosed report on the construction of the building, as follows:—

It has been necessary with a view to the due discharge of my duties, that I should practically acquaint myself with the details of the discipline generally, and the further experience I have gained as a commissioner of the Pentonville prison, has led me to the conclusion that the separation of one prisoner from another is indispensable as the basis of any sound system. It would appear, however, that even, should the construction of a prison admit of such separation, the means would still be required for varying the administration of the discipline to suit the varying circumstances under which it must of necessity be applied; that whilst it is desirable that a penal and reformatory discipline should be steadily adhered to for all convicted prisoners, and that the unconvicted should be protected by separation from loss of character and other evils, arising from association, the means should exist of rendering the discipline of the former class more stringent in certain cases, by

placing crank machinery in the cells, or making some such provision for giving effect to a sentence of imprisonment with hard labour. This discipline would be applicable to those cases where, from the shortness of the period of their confinement, or other causes, there was no reason to expect a deterring effect from discipline of a milder and more reformatory character.

In the foregoing observations, I refer to an application of the system, suited for securing the objects in view in this country, viz.:

1st. A system of discipline of a mild, reformatory character, adapted to periods of imprisonment varying from twelve to eighteen months, to which the class of offenders under sentence of transportation, and those under similar long periods of imprisonment in the prisons of the country, would be subject.

2ndly. A system of a more penal and corrective character, suitable for such short periods as would not admit of any hope of reformation, and for such characters as might be incorrigible by a milder system.

The principle of separation is admirably adapted to secure both these objects, but the administration of the discipline should, in my opinion, be essentially different. In one case, the deterring influence on others, which is the main object of punishment, is secured by the long period of the loss of liberty, and the discipline may therefore be safely relaxed in favour of reformation. In the other, the period being short, the deterring influence on others will be the stringent and distasteful discipline that would be established during at least a portion of the period of confinement. For this

purpose, I strongly advocate the introduction of hard labour, in combination with entire separation.

With respect to the period within which, as a general rule, a prisoner would be likely to derive any moral benefit by a system of separation, and of how long he could bear the confinement without injury to his health, the commissioners of Pentonville prison have never been called upon to express any specific opinion. Sir James Graham, then Secretary of State for the Home Department, in his letter of introduction to the commissioners, dated December 16th, 1842, after adverting in a most clear and luminous manner to the objects of imprisonment at Pentonville, states his opinion as follows:

‘Eighteen months of this discipline appear to me ample for its full application. In that time the real character will be developed, instruction will be imparted, new habits will be formed, a better frame of mind will have been moulded; or the heart will have been hardened, and the case will have become desperate.’

The experience gained in the working of the discipline during the past four years, has, in my opinion, confirmed the general soundness of these views, so far as the moral effects to be anticipated from the discipline are concerned. The results, however, have been more favourable than could have been expected from former experience, for there is every reason to hope that great good has been effected, and very few of the prisoners have proved to be incorrigible by it.

With respect to the physical effects on the mental and bodily health of the prisoners, I am of opinion that the period is as long as the generality of men can bear,

without some prejudicial effect arising from it. Many might bear a longer period, and some would fail in a shorter time, but as an average, it is as long a period as I could share the responsibility of recommending to be enforced, and I have reason to know that this is the view of others competent to pronounce a decided opinion upon the subject.

I feel it right to state that the greatest care, both as regards instruction, the administration of the discipline, and the diet, is necessary, in order to secure a successful result for any such period as twelve or eighteen months.

Her Majesty's Government having some time since determined on a change in the management and discipline of convicts, under sentence of transportation, who have heretofore been sent to the penal colony of Van Diemens Land, a new system of discipline, to be administered in this country, and applicable to a greater proportion of them, will probably be resolved upon. The details are, I believe, under consideration, and when they are promulgated, it will afford me much pleasure to give you any information I can on the subject.

I am, Sir, with much respect,

Your obedient servant,

J. JEBB, *Major, R.E.*

*Surveyor General of Prisons."*

*Dr. Tellkamp, &c., &c.*

The details of this new composite system of punishment are already set forth in the following extract:—

- C. *Extract from a letter addressed to Earl Grey, containing the views of Sir George Grey, Secretary of State for the Home Department, on the period of Separate Confinement, to be enforced under his authority, taken from papers on convict discipline, and transportation, laid before Parliament, February 16th, 1847.*

IT is not necessary that I should here enter into a minute detail of the arrangements and regulations which will be required for carrying out each of the successive stages of punishment. It may be sufficient that I should state that it is intended that the first stage, that of separate imprisonment, should in no case exceed eighteen months; and that the average term of such imprisonment should not be more than one year. It is proposed that this imprisonment should take place either in Pentonville prison, or in such of the prisons in the country, as shall be ascertained on inspection, to have made arrangements properly adopted for carrying out the system of separate imprisonment, and in which space accommodation exists beyond what is required for local purposes. It is computed, that in addition to the 500 cells in Pentonville prison, there are, or shortly will be, available in other prisons, a large number of cells for the reception of prisoners sentenced in Great Britain to transportation, and measures are in progress for the erection in Ireland of a prison on the model of Pentonville prison, for the reception of Irish convicts. It is further proposed, that this separate imprisonment should, towards its close, be gradually relaxed, with a view to prepare the prisoners for the second stage of imprisonment: employment on the public works.

(Signed) G. GREY.

The Home Office in London is in possession of many unpublished reports respecting the sanitary condition of convicts in separate confinement, from which the view above expressed, as to the proper limit of this mode of imprisonment, has been deduced as the result which they seem inclined to communicate freely to other governments. From a very interesting report hitherto confided only to the General Assembly of Prison Directors of Scotland, with respect to the separate confinement of youths, I make the following extract:—

*D. Report on the state of mind of the Prisoners in the General Prison at Perth, in Scotland, by Dr. Abercrombie, and Dr. Christison.*

*“Edinburgh, April 13th, 1844.*

“At the request of the General Board of Directors of the prisons in Scotland, we visited the general prison at Perth, on the 19th and 20th of March last, and again along with Lord Ivory and Mr. Rutherford, two of the members of the Board, on the 26th of the same month, with the view of inquiring more immediately into the situation of several prisoners, in whom there was reason to suppose that mental disease in various forms had been induced by the system of separate confinement pursued in the prison. Our attention, however, was also turned to the mental state of the prisoners generally, and likewise to their bodily health, and to the prison discipline and diet affecting it.

“We found some of the prisoners suffering under various forms and degrees of disease of the mind. Of nineteen cases which had been reported to the general

prisons' Board on the 2nd of March, by the governor and surgeon of the prison, and of which a schedule had been put into our hands, we found that one had been dismissed in a state of good health, his term of imprisonment having expired; and most of the others were improving, but three others had been added since the date of the report, to the list of those in whom the separation principle had been relaxed on account of the approach, or formation, of disease of the mind.

"Of these prisoners, in all twenty-two in number, nine were, or had been, affected with hallucinations, either simple or combined with weakness of mind; twelve with weakness of mind only; and one with hysteric nervousness, threatening to pass into insanity. Of the twelve affected only with weakness of the mind, eight had shown a marked tendency to an increase of this state while they were confined separately, and the four others showed the same tendency more obscurely.

"We have been led to ascribe the occurrence of a great majority of these cases, to the separation system, and for the following reasons:

"In the first place, the general bodily health of the prisoners seems to have been hitherto good, as may be inferred from their appearance from the low rate of mortality among them; there have been only eleven deaths during the last two years, in a population which, throughout the greater part of that period, has amounted to about 330, and from the low average of sickness, which in 1843 appears, from a document furnished to us by the governor of the prison, to have been no more than two and a half days for each inmate.

"In the next place in many of the cases, the affec-



tion of the mind clearly originated in circumstances connected with seclusion; such as illusions of the sight or hearing in the night-time, or alarm and restlessness from excessive dread of sleeping alone.

"And lastly we found that while some of the prisoners, whose minds had suffered, continued at the period of our visit, to exhibit symptoms of mental weakness, and others of excitement and hallucination, the greater number had very much improved from the time when they had put each into a cell with a companion.

"We are satisfied, therefore, that the surgeon of the general prison acted with judgment and discretion in recommending that, in all these cases, the principle of separate confinement should be departed from, to the extent which has been practised."

From the very detailed report, the following points also deserve especial mention:—

"The cases of mental disease have occurred chiefly among the *young* convicts, those from sixteen to twenty years of age. Sixteen of those enumerated were less than twenty, and eleven of these not more than sixteen. On the 2nd of March there were 128 males in the prison under twenty years of age, and of these, fifty-nine not more than sixteen. Of the total number 12½ per cent. have appeared to sustain injury of the mind; and among the boys not above sixteen, no fewer than 18¾ per cent. are similarly affected."

During the period of separate confinement of those limited to two years, it appears, on the other hand, that *adult* convicts experience less mental injury.

With respect to diet, the report continues: "According to the experience of similar institutions, it may be

regarded as a proper rule, with reference to health, for each convict to receive, daily,  $29\frac{1}{3}$  oz. avoirdupois of vegetable nutriment, and from  $2\frac{1}{2}$  to 4 oz. of animal food. Herewith accord the rules for the diet of the Scottish prisons; and it is found that epidemic diseases have appeared in similar institutions where the allowance of animal food was too much diminished."

*E. Report of the superintending committee of Milbank, touching the duration and the modifications of Separate Imprisonment.*

THE same grounds which, with the sanction of the Doctors Abercrombie and Christison, induced the physician of the general prison at Perth to depart from the principle of separate confinement in doubtful cases, and to give to each prisoner mentally affected a comrade, had previously prompted Dr. Baly, well known as an author, (translator of the Physiology of Professor John Müller, of Berlin,) the physician of the general penitentiary at Milbank, near London, to advise the Board of Commissioners of Milbank, to ameliorate the separate principle, and introduce a composite system.

Compare the elaborate treatise of Dr. Baly, respecting the dangers of separate imprisonment for the mental health of the convict, and the medico-chirurgical transactions, vol. XXVIII, London, Longman & Co., Paternoster Row; and also the reports of the superintending committee of the general penitentiary at Milbank, laid before Parliament, March, 1842 and 1843. There is, besides, in the Home Department, a report from Dr. Baly, upon the former mental diseases in Milbank penitentiary, which was not printed, to avoid prejudicing public opinion against separate imprisonment.

The following is from the printed report of the superintending committee of the penitentiary at Milbank, of the 18th of March, 1842:—

“Great alterations have been made in the discipline of the institution. In consequence of a distressing increase in the number of insane prisoners, the committee, under the sanction of Dr. Baly’s report, which will afterwards be noticed, came to the resolution that it would be unsafe to continue a strict system of separation for the long periods to which the ordinary sentences of prisoners in the penitentiary extend. They, therefore, proposed that the system should be relaxed, with regard to all classes of prisoners except two, viz., military prisoners (whose sentences are in general extremely short), and persons who have been guilty of unnatural offences; and that, as to all other prisoners, the prohibition of intercourse should be limited to the first three months after their admission, and that upon the expiration of that period, they should be placed upon a system of modified intercourse, consisting of permission to converse, during the hours of exercise, with two or more fellow prisoners; the privilege to be suspended for misconduct; and such a classification, with reference to age, education, character, and conduct, to be adopted, as would render the indulgence as little injurious as possible in a moral point of view. The committee also proposed, that whenever the medical officer should have reason to believe that the mind or body of any prisoner was likely to be injuriously affected by the discipline, he should have the power of suggesting a change in the particular case.

“The rules for effecting the foregoing alteration

having received the sanction of the secretary of state, were brought into operation on the 14th of July last."

I found these rules in force during my visit to this institution, although the Milbank prison then served only as a depot for old prisoners, sentenced to transportation, and who were often detained there for weeks and months only. Even from Pentonville the prisoners came here for two or three months before their transportation, and were kept during the time in *associated* confinement. This *associated* confinement previous to embarkation, was ordered by Sir James Graham, former minister of the interior, in consequence of the following circumstance: At the time of his administration, frequent convulsions occurred among the convicts from Pentonville sentenced to transportation. No notice was taken of it, until a communication respecting it appeared in the public papers, which came to the notice of Sir James Graham, who instituted an investigation, and made the above regulation. This circumstance has been especially alluded to in the tenth report of the Commissioners for the Government of the Pentonville prison, page 10.

F. *Limitation and modification of Separate Imprisonment at Trenton in North America.*

IN the prison at Trenton, I found, at my repeated visit in July, 1846, with the physician of the institution, Dr. Coleman, that similar regulations had, for similar reasons, been adopted. The peculiarities of separate imprisonment were in fact abandoned, as too dangerous to health. In the partition walls near the heating apparatus, openings had been purposely made, through which

the prisoners might communicate. I found, besides, in accordance with the direction of the physician, here and there two prisoners in the same cell, or labouring together in the court. Dr. Coleman declared freely, that while separate imprisonment had been rigorously enforced, the consequences had been extremely prejudicial to health, and certain other officers of the prison affirmed that in Philadelphia they were unwilling to conceal the dangers of separate imprisonment, while the gentlemen, by whom it was introduced, continued to be inspectors. It is confessedly difficult to change one's preconceived opinions. In Trenton, on the contrary, the prison was regarded as something novel, and impartially judged according to its results. As I have expressed at length upon this subject in my former work, page 47, there is a lack of instructors and court-yards at this institution at Trenton, in consequence of which its results are particularly unfavourable. Its history exhibits, however, the effects of separate imprisonment in its rigid application.

We have here, then, three prisons, in which separate imprisonment has been introduced, viz., at Perth, in Scotland; Milbank, in England; and Trenton in America, in which the physicians, with one accord, have, on account of its danger to the mental health, occasioned a change from separate to associated confinement. This result has been attained, while as yet but *little had been published* on the subject, and the physicians, independent of each other, *were guided by their own observations*. In accordance herewith, we have a Swiss report, drawn up by Dr. Verdeil, (vice-president of the board of health, and member of the commission

for the hospitals and houses of detention,) who says, in reference to this subject, among other things: —

“After nine years of scrupulous and careful experience, thirty-one cases of mental disease, and numerous relapses constitute so many facts observed since the application of perfect silence and solitude, which protest against the Philadelphia practice.

“From such facts, ought not the system to be modified so far as concerns us, who were once warm partizans of a system, the effect of which, we were assured, would be to reform the guilty, and intimidate the incorrigible; we deem it the fulfilment of a religious duty to publish the defects of a mode of punishment, in whose application we participated with confidence, until we discovered our error.”

This common result, drawn from a careful observation of facts in different countries, teaches us the necessary consequences of the peculiarities of separate imprisonment. We must, therefore, regard what is proclaimed by the according experience of different countries, not as the result of chance, but as a general truth; for where repeated observation and experience lead to constantly recurring and similar results, there is no longer room to doubt their reality.

To this must be added further, that consumption and scrofula are remarkably developed in separate confinement; on this account the convicts are often pardoned “on medical grounds,” that is, on account of threatening dissolution, and commonly die outside the prison. This is the case in the United States as well as in England. Thus, for instance, according to the report

of Milbank penitentiary, March, 1842, out of an average number of 692 convicts, fourteen, viz. seven men and seven women, were pardoned "on medical grounds" during the preceding year.

For the Pentonville prison, as has been observed, the healthiest and best prisoners are selected by Dr. Baly from the Milbank depot, and Dr. Bees, at Pentonville, returns those he chooses not to accept. Still the cases of consumption and weakness are so numerous, that there is a constant necessity for lightening the labour of the convicts; for example, changing weaving for tailoring; and of the very carefully treated prisoners of Pentonville, there were pardoned "on medical grounds," according to the second report of the institution, pages 50 and 55, during the year preceding the 10th of March, 1844, three; according to the third of the 31st December, 1844, page 17, seven; according to the fourth report, page 34, during the year 1845, four; and according to the fifth report, page 51, during the year 1846, one.

#### *G. Prison Fare.*

THE remarks of Drs. Abercrombie and Christison, in their communicated report respecting the good nourishment necessary in separate imprisonment, have been confirmed in this respect by the experience at Philadelphia<sup>1</sup> and Pentonville. In the Pentonville prison, a more spare diet was once attempted, as such fare was regarded in the public estimation to be proper for criminals; but it was found to be attended with danger to the mental health of the convicts, and it was concluded

<sup>1</sup> Compare my former work upon Penitentiaries, page 106.

that separate imprisonment requires a more careful nourishment.

For breakfast, the prisoners there have cocoa-drink; for dinner, soup, four ounces of meat weighed after being cooked, and a half pound of potatoes similarly weighed; for supper, hulled oats. Each prisoner has, besides, a pound of bread, with salt and pepper daily. Although this diet is better than that of most poor labourers, we still find in the fourth report of the institution, page 41, under the head of *Extras* for sick prisoners, for sugar, wine, &c., £130. 10s. 7d. sterling. Dr. Bees, the physician of the institution, labours like a father for the convicts, in order to attain a favourable result, and I was assured by the officers there that a similar care is necessary to obtain as favourable results in separate imprisonment, as is effected at Pentonville.

H. *Limitation of Separate Imprisonment with respect to the moral improvement.—Experience acquired at Pentonville and Parkhurst in this respect.*

It is highly deserving of attention, that even for the *moral* improvement of the convict, according to the experience of the Pentonville prison, the first twelve or fifteen months of separate imprisonment work more favourably than afterwards. They have arrived at the conclusion there, that on this account, this mode of punishment ought not to exceed eighteen months. The detailed report of the Chaplain Kingsmill, contained in the fifth report of the Commissioners for the Pentonville prison, 1847, page 42, wherein he gives the experience of that institution since its establishment, with



respect to the 1000 convicts hitherto confined there, is, in this regard, very encouraging. Mr. Kingsmill expresses the above-mentioned conclusion, and says, "The loss of freedom and society, so necessary for a time, even according to the opinion of the prisoners, will become intolerable when they feel that they are prepared to be useful; and the question arises whether any further good can be attained by a longer exercise of the passive qualities of the mind. I have therefore desired to see a well ordered system by which the religious and social faculties might be actively exercised before the prisoners come from their solitude into the world. This is necessary to the attainment of the object in view, viz., the fulfilment of the duties of active life in civil society."

Mr. Kingsmill proceeds—"From the condition in which I found this class, when assembled before their embarkation, I am persuaded that after a certain period of separate imprisonment, by a well ordered system of *associated* labour, instruction and religious exercise, much good might be accomplished. Really improved people would, as I have seen them on board the transport ships, prove themselves useful to their fellow prisoners; the greater number, I am convinced, would show themselves capable of elevation to the better feelings of mankind; and the entirely depraved would be sooner recognized than is possible in separate imprisonment, and would be treated as they deserve. Their overseers must have patience with the improving, and must evince an interest and confidence in improvement already made. In this way the desired good will be accomplished."

With the views of Mr. Kingsmill, founded upon long experience, my own observations of the mingled system

adopted in Parkhurst prison, which consists, at first, of separate, and afterwards of associated confinement, agree; I shall give, therefore, in this place, a detailed account of the peculiarities of this institution, intended for juvenile delinquents, and a comparison of it with certain other prisons for similar offenders; as from thence certain conclusions with respect to the probable consequence of the new infliction of punishment for adult convicts in England may be drawn. For, according to experience, among adult offenders, it is only the *younger*, and not the old hardened criminals that are susceptible of improvement.

The Parkhurst prison stands upon the Isle of Wight, and consists of two institutions. The older is occupied by the older boys. The more recent, which is placed upon an eminence, is for the younger boys. The entire prison is under the superintendence of Mr. George Hall, formerly an officer; and the recent institution under the especial care of the chaplain, Mr. Welby. Both seemed to me very clever people, devoting themselves heartily to their calling. In the older institution there is a recently erected wing, with separate cells, and a school-room with separate seats. The mingled system is applied as follows: The newly admitted boys are, during the first four or six months, entertained in separate confinement, in the new wing; instructed and employed. They are there treated as the boys in the prison La Roquette, or as the adults at Pentonville. After being instructed in religious and other useful knowledge, directed to self-reflection and accustomed to obedience, order and cleanliness, and weaned from former evil habits, the older boys enter the older prison, the

younger ones the other. In these the boys are only separated at night. They are assembled by day, but continual silence is required, except at meals. They labour in common, and receive instruction in classes, in religion, reading, writing, arithmetic, geography, history, gymnastics, &c. The boys evinced in their schools, as I had frequent opportunities to witness, industry and intelligence, and their swinging and gymnastic exercises seemed to afford them real satisfaction. In the latter they exhibited to me willingly their great skill. Every thing necessary for the institution is produced in it, for the employments of the boys are shoemaking, tailoring, cabinet-making, blacksmithing, agriculture, &c. The boys take great pleasure in agriculture, obtain by it the greater part of the food of the institution, and also secure their health. This agrees with the economy of many of the manufacturers of England, who afford their workmen an opportunity to apply their leisure hours to agriculture and horticulture, by which means the physical and pecuniary good of the labourer is cared for, and their children especially, trained by healthy and useful employments, as little gardeners, &c., to robust men. I saw in Parkhurst a division of boys working in the field under the oversight of an under officer, whose escape was not feared, as Parkhurst lies upon an island. The boys are employed in separate places in small divisions, under overseers. They take their meals together; the nourishment is as healthy as that at Pentonville, already described. Military order prevails. The boys march in silence to their work, to school, to meals and to play. In their leisure hours they are permitted to converse and play under the observation of an in-

structor. It is delightful to witness these ranks of very healthy-looking boys, marching in deep silence upon their play ground, and the sudden transition to cheerful tumult, the moment the signal for play is given. As soon as the bell rings for labour, all hasten back, in silence, to their employments.

The boys appeared to be very healthy, cleanly and orderly, and the chaplain, instructors and officers expressed themselves well satisfied with the moral improvement of most of the boys, evinced by continued good conduct and honesty in conversation and manners, while at their reception they had been very unreliable. The reports relating to Parkhurst prison laid before Parliament for the last years, contain many interesting facts in this respect.

Hitherto the boys have been sent from here to Australia to spend the last years of their punishment. They have been usually transported with the convicts from Pentonville, and the best among them obtained their freedom in the colony; the less reliable continuing under restraint. It has recently been determined, however, to apprentice the boys, who appear to have been improved at Parkhurst, to artisans and farmers, as is done with much success in America, under the condition that those boys, who conduct themselves badly in this relation, shall be returned to the institution, and there finish the rest of their time of punishment. For the possible returns of the boys, their masters, and the county, in common with the police authorities, shall take care. From the experience in America it is to be believed, that by far the greater number of such boys, are orderly and industrious, and become useful citizens.

The really improved boys devote themselves zealously to the families by which they are protected, and those not improved know, that the rest of their punishment hangs threateningly over them, and that they will have to return to the prison, the moment they conduct themselves badly.

The opposers of this measure in England fear, that the whole system will not be sufficiently intimidating, and that poor parents will the more willingly incite their children to theft and dishonesty, in order to have them brought up at the public expense.

This doubt, however, with regard to such measures, cannot be avoided, for if parents are so completely impoverished, or so heartless and vile that they seek to rid themselves of their children by leading them to crime, the children should be freely placed in houses of correction upon the model of Parkhurst; for it is these very children, thus neglected by their parents or guardians, who constitute the ever renewing harvest of criminals. It is precisely here that the root of the evil may be grappled. It is more christian-like, more consistent with the public safety, and cheaper withal while they are *young*, and corrigible and docile, and upon this docility everything depends, to train them up to usefulness, than to permit them to live by beggary and theft at the expense of civil society, until at length, hardened in crime, they must be convicted and imprisoned or transported, and this too at an age when they can as hardly be reformed as an old crooked tree be straightened. As has been said, it is impossible, as a rule, to improve *old* criminals even in the excellent Pentonville prison. The careful nurture of child-

ren is the surest preventive of crime, and one of the best means of promoting the public safety. It would be anomalous, therefore, to expend such large sums as is done upon penitentiaries, and to be so sparing of the means necessary for the proper nurture of children. By such badly applied economy society brings upon itself the most serious injury; for the public safety is continually threatened and injured by the ever increasing numbers of neglected youths, however the courts and the prisons may be filled from the rushing stream of abandoned criminals.

It is only necessary that houses of correction have a penal character, so as to exert a deterring influence, in order that such institutions should not serve as inducements to crime; on this account, as well as with a view to improvement, all punishment should begin with several months of *separate* confinement, combined with *hard* labour, which generally intimidates idle and vagrant offenders.

Measures of this kind are necessary, for I found everywhere in England the prisons filled with a disproportionate number of very young culprits, who had frequently already suffered one or more brief terms of imprisonment. Upon inquiry as to the causes of this circumstance, I found them to be, in general:

1st. *Neglect*, from the lack of good parental instruction, in consequence of the early loss of parents, elopement from them, or ill treatment of step-parents.

2ndly. *The taste for pleasure* too early awakened. The greater number of those youths had stolen in order to frequent the theatre, porter houses, &c.; this evil is so keenly felt, that the public attention is directed

to the necessity of a more careful and comprehensive instruction of the people. The greatest difficulty in this respect consists in the fact, that compulsory attendance at school is regarded as incompatible with English freedom. The causes of this early depravity lie, however, less in the want of school instruction than the great lack of household discipline. The disposition and character of the child is formed more in the family than in the school, and the latter can very seldom supply the place of the former. Institutions like Mettray only, to which we shall hereafter allude, answer this end the most perfectly.

In the borough prison at Liverpool, I found a remarkably large number of juvenile delinquents, who in fact belonged to the age of childhood. They were *not* there, as at Parkhurst, detained in separate confinement during the first part of the time; but the boys occupy one division and the girls another. In both divisions they are constantly together. The instructors complained of the impossibility of promoting reformation, and of the constantly relapsing children, and gave their decided approbation to the mode of instruction at Parkhurst.

Lord Denman, the distinguished Chief Justice of England before-mentioned, declared to me from his observation, that the constantly renewed crimes of children and youthful offenders arose from the fact that there is a class of people in England, as with us, living from the proceeds of crime, among whom were very wealthy persons, namely, pawn-brokers, who played the part of receivers with great cunning, inviting children and young people to crime, and then upon

the trial, attempting to screen them as their instruments, by which a ceaseless burden was cast upon the police and the courts. The justice of these remarks I had myself an opportunity of corroborating, from the expressions of certain of the boys imprisoned at Liverpool. To my question whether they did not perceive that it would be better to lead an honest life, they replied, "that they feared, after their discharge they should again commit crime; they had no money, and must therefore hasten back to their old haunts, where they were acquainted with so many bad people, who would again, as before, take advantage of them, until they should again get into prison." One of them, to whom I related that the New York Association sought to protect the discharged convict against new errors, and obtain work for them, interrupted me eagerly with the request, "O can you not send me there, as soon as I am liberated; I would like to go there, where I could again lead an honest life." All I could do, was to enlist the interest of the officers of the prison in his behalf.

At Wakefield prison, one wing of which, containing about sixty cells, is occupied by boys, I spoke with some thirty of them, most of whom had already been three or four times in prison. They had been led into theft and burglary, not by poverty, but by vagrancy and frequenting theatres, taverns, &c.; were orphans, or had eloped from their parents, and had lived in infamous lodging-houses, notorious for their connection with receivers of stolen goods. In this way, much time had elapsed before they were arrested and punished. This early and deeply rooted depravity, must,



by proper training in the family and school, be obviated. Such prevention of crime is evidently of more importance than its subsequent punishment.

The boys in Wakefield prison remain in separate confinement during the whole term (at most two years). The effect is, notwithstanding, neither deterring nor reforming; they return as often as when associated imprisonment prevailed. These facts show that neither system prevents relapses. The most certain method of obtaining this end, is by proper care for neglected children, employment, or the adoption of them into respectable families, as is done in the United States. Without care for the neglected, relapses are unavoidable. During the first year after the opening of the Wakefield prison, the boys were as rigorously confined as at the prison La Roquette, and were only allowed a little exercise daily. The consequence was, that very many became stiff in their knees, and besides very weak and unhealthy. This disappeared as soon as the superintendent allowed them to engage in foot-ball and other sports. The boys now receive their instruction, and engage in their amusements in common, and are healthy since the change.

From this experience I am little inclined to place entire confidence in the favourable reports which, from time to time, we receive respecting the prison La Roquette, as for example in the *Gazette Médicale de Paris* XVIe année, troisième série, tome I, Feuilleton, *Une visite aux prisons cellulaires de France*, pages 906—919. The experience of Wakefield prison sanctions the inference that the continued separation of the boys through so many years in the prison La Roquette

would have a very prejudicial effect upon the health, and in fact the frequent deaths in this prison are notorious. This prison was not originally intended for separate confinement, but was constructed after the model of Bentham, in vogue in England some thirty years since. It is notwithstanding as well managed as the old prison will allow, and the instruction and treatment of the children seem to be good. Many of them appeared, however, when I visited the institution in December, 1846, in comparison with the boys at Parkhurst, very pale and feeble. The malaria of the fever was suggested to me as the cause of this appearance; but the air seemed healthy. The prison lies open, and is surrounded only by low houses. As the complete examination of the French prisons, and their results, is much more difficult than in England, so it is less easy to decide as to the effects of the prison La Roquette; and as I was informed in Paris that the results had been communicated to the Prussian minister at length, I shall pass them over in silence.

Unfortunately my time would not permit me to visit Mettray, which institution, according to general report, is one of the most instructive. At the same time with myself, Messrs. Gladstone (a relative of the former English minister of commerce,) and Chaplain Turner, visited the Parkhurst prison. Both gentlemen had but a short time previously spent considerable time at Mettray, and preferred the arrangements of the latter institution so decidedly to those of Parkhurst, that they purposed to attempt the modification of the institution near London, with whose oversight they were connected, viz. the Philanthropic Society, St. George's Fields, in

Middlesex, for abandoned children, after the model of Mettray. They acknowledged the undertaking to be a difficult one, for the secret of success lay not so much in Mettray as in M. Demetz. Only a man, who, like M. Demetz, had made the reformation of juvenile delinquents the object of his life, and had devoted himself to this object with his whole soul, with conspicuous talent, with warmth of feeling and firmness of character, and who knew how to animate his associates with similar zeal, could hope to effect as much good as had been accomplished at Mettray. From what I have read of Mettray and M. Demetz, this judgment is undoubtedly correct, and therefore it is difficult, although not impossible, for a state to establish similar institutions under the direction of similar men.

According to the printed reports of Mettray, the fundamental principles upon which this *Colonie Agricole* is founded, are the following:—

1st. In the employment of accomplished teachers in the education and training of the boys.

2nd. In the formation of little family circles with an instructor at the head, and separate apartments for each so-called family.

3rd. In the use of moral suasion instead of force in the management of the boys.

4th. In the healthy employment of the boys in agriculture, which also affords less opportunity for intercourse than sedentary employments.

5th. In the combination of liberal contributions from private persons, with the support and protection of the government.

M. Demetz has sought to make the arrangements at

Mettray coincide as nearly as possible with the family economy. This principle comes the nearest to the nature of things. The family is the best nursery of all social and civil virtue. For the want of it, neglected children suffer more than from any other cause, as I think I have already shown by the examples in this respect, borrowed from England. The nearer, therefore, that an institution for juvenile offenders approaches the family relations, the better it is. This is the great merit of Mettray. Under the careful guidance of an *unpaid* teacher, who renders his service solely out of love to the cause, every forty boys occupy a house and garden. The whole establishment numbers many such teachers and houses. The instructor lives with the boys constantly, teaches and labours with them. Confidence and affection animate both instructor and pupil, rivet them to M. Demetz and effect the well-known favourable results. In all the recent penitentiaries of France, at Mettray, Bordeaux, and Marseilles, &c., for juvenile offenders, agricultural employments have the preference. Institutions of this kind are constantly multiplying in France, as for instance in the Department de Maine et Loire and de l'Aube. The prison of La Roquette, although to be regarded as a well intended effort, boasts no imitators.

### III. PROPOSITIONS RESPECTING THE INFLICTION OF PUNISHMENT BY SEPARATE IMPRISONMENT.

IF we review the communicated results of the experience obtained in England and America, and ask, what is to be recommended, the answer must be as follows.

The prisons in Germany as well as in England, already built, or in the process of construction, with single cells and courts, should serve,

1st. For the abbreviated detention consequent upon the present public proceedings of criminals before judgment.

2nd. For all convicts sentenced to houses of correction, compulsory labour, or labour upon the fortifications. Of these, however, the following should be excepted. Separate imprisonment is not to be imposed upon: 1st, convicts whose health requires a different mode of punishment; and 2nd, those sentenced to imprisonment for life, for it would be cruel and useless to retain these for a long time in the costly and mentally injurious *separate* imprisonment. As well with respect to the mental health, as the moral improvement, and the great expense of separate imprisonment, it is advisable that the convicts should pass the first period of their sentence, perhaps twelve or eighteen months, in separate confinement, being treated, employed, and instructed during this time as at Pentonville and Parkhurst, only the labour should be *more severe* than it is there, in order that the punishment should exert a deterring influence upon the great number of lazy criminals.

According to English experience, it is deemed inexpedient with respect to the health, the moral improvement of the criminal, and the expense of this mode of punishment, to extend the period of separate confinement beyond eighteen months or two years. I am likewise unwilling to recommend a longer period.

Should the experience in England and America be held as satisfactory, the first period of separate impri-

sonment might be fixed provisionally, at, perhaps, eighteen months, and then the question might be laid before a commission of German physicians, as to what duration separate imprisonment might be applied as a general mode of punishment without danger to the mental health of the convict. The criminals may, during the time of separate punishment, receive more instruction than in associated confinement. The chapels, in all prisons without exception, should have separate seats, similar to Pentonville, for service upon Sunday and for instruction during the week.

As every English and American prison is placed under the superintendence of a number of men, who are partly officers and partly citizens, and who bear the name of "Inspectors," or "Commissioners," &c., so it would be advisable here, to constitute a similar superintendence of officers and private men, who reside in the vicinity of the prison. I have expressed myself at length on this subject in my former work, pages 115, 117, to which I refer.

It is the duty of such inspectors to visit the prisoners in their cells unaccompanied by the officers of the prison, and to see that they are not treated with cruelty. The authority might be confided to them in connection with the physicians and officers of the prison, as in England, 1st, to transfer those prisoners whose health began to suffer from the effects of separate confinement; and 2ndly, they should have the right, with the approval of the superior administration, to continue in separate imprisonment those convicts who might prefer it.

The number of those who of their own accord should

prefer separate confinement during the whole term of their punishment, would evidently consist of the most docile. Many of these, in the prisons of the United States and England, seek to avoid all association with the other convicts, so as to be less easily recognized by them after their discharge. It is clearly advisable to accede to this request. Selecting separate confinement *of their own accord*, they would be enabled to bear it more easily, and with less danger to their mental health. 3rdly, the above-mentioned board of superintendence might be authorized to designate to the superior administration such convicts as are especially depraved and injurious to the others, and to recommend that they be kept in separate confinement as long after the expiration of the first period as may be advisable. Female convicts should be confined in separate prisons, or at least in separate wings. In England, these are under the superintendence of the chief keeper, the matron, and a number of worthy ladies, which last, from time to time, visit the female prison. A similar arrangement might be recommended for Prussia.

A committee of ladies is connected with the Prison Association of New York, to whose assistance many a female convict is indebted for her return to virtue.

Even in the best prisons it is requisite that members of this board of superintendence should occasionally visit the convicts, so as to obviate possible misuses or neglect on the part of the prison officers. Without such supervision, modifications foreign to their original objects may easily be introduced into any prison. For the disciplinary authority of an officer may

be so much the more easily abused, as his patience will be so frequently tested by the convicts. Where this supervision is wanting, the greatest cruelty may be exercised, without coming to the light. The mild discipline and government of the prisons in Philadelphia is to be ascribed more to the benevolent and humane influence of the Quakers, and the inspectors who think with them, than to separate imprisonment; without this supervision, this system may be easily changed to the most cruel mode of punishment. No system of punishment but requires the most careful conduct and treatment of good officers, instructors and inspectors.

To harmonize the infliction of punishment by separate imprisonment with the criminal code, there should be a legal measure of the relation of separate imprisonment to the modes of punishment hitherto in use. As I have already observed, this measure, founded upon experience in England and practically established there, regards each month of separate imprisonment as equal to *three* months of transportation or other confinement. This measure is there considered, by jurists and the public, as generally just.

The judges may continue to sentence according to the penalties provided in the code; they must, however, be charged so to apply the above measure, as to estimate, in long sentences, the first period of eighteen months separate imprisonment as equivalent to  $4\frac{1}{2}$  years of other confinement. The judges may, accordingly, in their sentences, fix the duration of separate and associated imprisonment, or simply sentence according to the penalties provided in the code. In the latter case, the above-mentioned board of superintendence should



be empowered to apply the general measure suggested for the continuance of separate imprisonment in each particular case.

In the cases previously suggested in which, 1st, prisoners of their own accord prefer separate confinement, or, 2ndly, those whose influence would be injurious to the others, and therefore remain in separate custody beyond the first period of punishment, a limited abatement only, of the remaining sentence should take place. A greater abbreviation should only occur in the way of pardon; for criminals who are sent back from associated to separate imprisonment, as a punishment, no allowance should be made.

The dread of being removed from associated confinement to the cells, as a penalty for bad conduct, will suffice to secure order and silence, without resorting to the severe corporeal penalties, with which the Auburn or silent system in America is justly reproached. In the female prison at Sing Sing, and in all the English prisons named in the commencement of my report, in which I found the silent system in force, all bodily inflictions as disciplinary punishments are discarded, and instead of such inflictions separate imprisonment for certain days, weeks or months in the cells, of which a sufficient number is provided in each prison, suffices. The silent system in its application in England, has, therefore, acquired a milder character than it had originally in America.

In the punishment of criminals, sentenced to five or six years of confinement, it would be advisable to change the confinement according to the proposed measure for separate imprisonment to two years; and not to allow

of associated imprisonment at all. In larger terms of punishment it might be advisable here, as in England, after the termination of the first eighteen months, to continue the separation at night only, and permit associated labour by day. By the proposed alternation of both modes, the punishment itself will acquire such an elasticity in its application, that it will be possible to avoid the doubtful points of the Philadelphia and the Auburn system, and to combine the advantages of each.

The convicts in associated imprisonment should be carefully classified according to age, health and education, as developed at the trial and in separate confinement. They should labour in small divisions of perhaps twenty-five men. Horticulture or agriculture should be recommended as the employment in spring, summer and autumn, and mechanical or manufacturing industry only during the winter, and in case these employments were insufficient for the whole number of convicts. In this respect, the successful experiments at Parkhurst in England, and at Mettray are very instructive. Agriculture and horticulture separate the workmen more than manufacturing employment, prevent, therefore, more easily all communication,—facilitate moral discipline, as is everywhere demonstrated by agricultural people,—promote health, and exert a particularly favourable influence in scrofulous diseases, which, in separate confinement, are very speedily developed. Fresh air and farming occupations are in Mettray regarded as the best medicine, and in the best manufactories of England the effort is now made to induce the workmen to employ their evening hours in horticulture, for the sake of their physical welfare. These facts deserve

consideration also, in connection with the present subject.

There are in Germany still many tracts of waste land, which by irrigating or draining, and above all by careful labour, might be rendered productive. As the state has to provide for thousands of convicts, requiring no wages, but cells, coarse clothing and simple diet only, and as the management in Prussia is generally economical, it is to be expected that in this manner tracts of land might be made productive, whose produce and value would at least equal the labour expended upon them. In this way peaceable conquests might be made, and the general welfare promoted. It might, therefore, be advisable to erect prisons in such districts, with perhaps 300 cells, especially in case new prisons are to be built; or old prisons conveniently situated might be fitted up with cells.

In England extensive tracts have, by irrigation or draining, and this too by free labour, been rendered productive.

A comparatively small number of soldiers would suffice to establish a cordon around the convicts while labouring in the field, so as to prevent escapes. In Sing Sing twenty-five men armed with loaded weapons are sufficient to prevent escapes among a thousand convicts or more. This is not so difficult as it would appear to be, for the convicts know that not only these twenty-five men, but every citizen would be interested to send them back to prison in case any should attempt to escape. Should it be thought necessary to employ a larger military guard, which in our circumstances might be advisable, a few battalions would suffice to

watch over the associated bands of convicts employed in different places. In this way the military might render the state a very substantial service, which, however, might be dispensed with in winter when the convicts were employed in their workshops at mechanical or manufacturing labour.

With respect to the latter employments it is known, that in Germany as well as in certain of the United States, the artizans and manufacturers have complained seriously, that the labour of convicts was hired so cheaply by the contractors, that it enabled them, in consequence of the greater cheapness of the ware produced in prison, to undersell and supplant the free labourer in the market. To afford no ground for this complaint it would be advisable, either, as in the Eastern Penitentiary at Philadelphia, to admit no contractors and to sell the wares at the market price, so that the prison in this respect would stand upon the footing of a manufactory; or, as in the houses of industry at Bremen, to labour for export. By these means the monopoly of the contractors, which clashes with the free labour of the mechanic and manufacturer, would cease. If no contractor enjoyed the monopoly of the cheaper and uninterrupted labour of the convicts, and if the products of convict labour were sold in open market as other products are, there would be no ground for complaint; for the convicts would have been compelled, had they been at liberty, to labour either in workshops or in the field, in order to earn their support. While unemployed, and obtaining a livelihood by criminal means, they have been imprisoned, and if they labour there no one would complain, if their employment by

contractors did not disturb the regular course of trade. Where this is not the case, such institutions stand upon the footing of manufactories, of which no one complains. That the prisoners should manufacture all the articles needed by the prison, for example the clothing for the prisoners, repairs, &c., I have already set forth in my work before cited. At any rate the complaints referred to, and the difficulty of finding useful and healthy employment for the criminals, would be avoided, in case horticulture and agriculture should constitute the predominating pursuits.

Industry and good conduct, should, as in England, be rewarded:

1st. By compensation from any possible surplus of earnings; which should be deposited in savings banks, to enable the convict at his liberation to embrace some honest employment or to *emigrate*. (The latter is particularly advisable.)

2ndly. By recommending the discharged convicts to the prison societies, who should aid them with good council.

The most important consequence of this consists in the fact that the liberated convict, who desires to lead an honest and better life, is protected by such a society, and freed from the influence of former fellow convicts. It is well known that discharged convicts often exercise a very injurious influence upon their former companions by threatening to expose them. Many a convict is thus prevented from leading an honest life and incited anew to the commission of crime. This is one of the reasons which led to the introduction of separate confinement in Philadelphia. This rea-

son ceases to be of force, however, as soon as the discharged prisoner is protected by the prison association. The experience of the New York Prison Association affords the gratifying evidence that the greater number of liberated convicts prefer an honest to a dishonest life, in case they are placed under the guardianship of a society of respectable men. This fact is regarded there also as removing one of the weightiest objections to associated imprisonment. Even separate imprisonment, without a similar care, as I have expressed in my former work, page 151, is attended with relapses. In this respect, also, the question depends less upon abstract systems, than upon the manner of their application.

The Prison Association of New York advises the liberated convicts to acknowledge themselves as such to those by whom they are employed. The agent of the society does not withhold the fact that the *protégés* are discharged convicts. The demand for labour is there so great that the agent is in circumstances to obtain employment for those seeking it. The two following examples may suffice, instead of many others that might be quoted, to show that the open acknowledgment of having been in prison has been advantageous to discharged convicts. A discharged convict in New York conducts a hotel which is patronized by the wealthiest people, and another, since his discharge, has amassed a respectable fortune as a chemist. Both occupations depend upon the confidence of the public, and this is bestowed upon individuals whose former crimes (forgery) were as generally known as their business tact.

Those discharged convicts not placed under super-

vision, and who find employment elsewhere, are at liberty to pursue their own choice.

But if, after care has been taken for the improvement of the discharged convicts in the manner indicated, one should now and then be unwilling to engage in honest labour, and prefer to pursue his old practices instead, subjecting himself repeatedly to imprisonment, he proves himself to be incorrigible and the question arises, what shall be done with such? This inquiry especially concerns the great number of depraved criminals in the United States and Europe, who live by crime; as for example, pick-pockets, burglars, swindlers, forgers, &c. People of this sort are, for the most part, of idle habits, and use every means, therefore, to live without work, and are in fact incorrigible. For repeated crimes of this nature, it seems proper that the law should decree that the second or third offence should be punished, as in England, with transportation or imprisonment, in both cases for life.

It is the duty of the government to provide for the safety of person and property, and so protect the peaceable citizen from the attacks and injuries of incorrigible criminals. Either society or the criminal must suffer, and justice demands that the guilty should suffer. The incorrigible criminal is unfit for civilized society, and should be excluded from it. The prisons intended for these might be similar to those which serve for the second or associated period of imprisonment, having separate cells to be used at night, and provided with workshops and gardens for associated employment by day. Silence need be maintained, however, only during the hours of labour; in the periods of leisure, the

prisoner might converse in the presence of an instructor, or the superintendent; but conversation of an immoral or depraved character should not be allowed. In this manner all unnecessary severity might be avoided, and society secured from incorrigible criminals.

Juvenile offenders under sixteen years of age should be sent to prisons especially provided for them. It need hardly be mentioned that the boys and girls should be kept in separate institutions. The management of these should be like that of the boys' prison at Parkhurst, or the institution at Mettray. In the first case the children should be detained only the first month in separate confinement, and in associated confinement afterwards. Success will depend chiefly upon the careful selection of officers, instructors and chaplains. The permanent separation of children, as at La Roquette, is not to be recommended. Even in Pennsylvania, where separate confinement for adult criminals prevails, the children, in the house of detention at Philadelphia, are kept in associated custody by day, and are separated by night only; and the same regulation prevails in all the other prisons for youth in the United States, as at New York, Boston, &c. The prison La Roquette stands alone, and it is especially noteworthy that even in France, Mettray is adopted as a model instead of it.

Persons who have committed crime while insane, must be sent to mad-houses; the time spent there, however, should not be reckoned in the period of punishment. Should this rule be adopted, instances of feigned insanity would not often occur.

The principle by which I have been guided in the preceding propositions has been to investigate carefully



what experience has hitherto demonstrated to be expedient, in order to ascertain by its light the improvements adapted to our own country.

---

## 2. ON PRISON REFORM.

An enlightened and well ordered state should regulate its penal laws according to the demands of humanity and reason, should apply them with impartiality, and enforce them with certainty, justice and inflexibility.

OSCAR, *King of Sweden.*

I MAY be indulged in a candid criticism on the creditable experiments in prison reform; for impartial criticism is the best service that can be rendered where the end aimed at is still greater reform. In criticizing the merits and defects of the prison discipline of America, a subject upon which the Americans are justly proud, from the fact, that they have taken the lead in its improvement, I shall not do it in the spirit of fault-finding, but with the expectation of suggesting still further improvements. If defects exist in the prevailing Penitentiary Systems, it is not a matter of severe censure; for infallibility is not to be expected in the conduct of human affairs.

We must acknowledge that there are other benevolent means calculated to operate as preventives of crime, such as a more general diffusion of education among all ranks of the people, employment of the poor, habits of temperance, and similar measures, more effectual than the reform of prisons and of convicts; but

the latter, at all events, is worthy of our serious attention.

The deep interest taken in America, as well as in Europe, in penitentiaries, is to be attributed to the belief, that by means of them the *moral reformation* of the criminal can be effected. Religion, humanity, and civil order, point out the object of all punishment. Crimes militate against divine and human laws, yet if their punishments were cruel, the mode of punishment would but increase the evil. By the introduction of a punishment which, while it afflicts, also improves the criminal, we approximate nearer to the realization of justice, and oppose, in the spirit of Christianity, good to evil; for an enlightened conception of the principles of justice would dictate the necessity of avoiding in the treatment of convicts all unnecessary cruelty. Punishment is made more certain if it is mild and reasonable, for then a jury will not shrink from the responsibility of giving their verdict according to evidence. Brute force can have but a short period of existence in a civilized society. A government compelled to oppose its enemies only by physical force, would soon lose that moral power by which governments can alone be effectually sustained. The true end and design of government is legal security, which cannot be preserved without the controlling force of criminal law. The power of the criminal law depends upon the approval of public opinion. The law must, therefore, necessarily be so reasonable that enlightened public opinion can approve of it. Every member of society is personally interested in the due execution of the criminal law, because every one desires to be secure from injuries to his person or

property. And every person, therefore, even from selfish motives, should take an interest in this subject. But there is a higher reason than this. In all our relations we should endeavour to be just. We should claim nothing but justice. If we transgress this limit, we err either on the extreme of cruelty or of mistaken clemency.

It is proved by sad experience, that despotism can not be exercised more effectually than under the legal form of cruel criminal laws, and that it can be exercised by such means, whatever the form of government may be. Thus, for instance, in the Republic of Rome, the power of life and death was given to every principal magistrate, and that authority was derived from the wealthy class of citizens. Consuls, prætors, and quæstors, caused the inferior citizens of Rome to be scourged with rods, and put to death, until the *Lex Porcia de tergo civium*, made by Porcius, the tribune, ordained that no magistrate should punish with death, or scourge with rods, a Roman citizen, but simply direct him to go into exile.

All history, however, proves that a cruel administration of the criminal laws has never been able to exist, for a great length of time, among a people whose course was onward, and whose aim was the establishment of a just and reasonable government. For instance, the criminal laws in England became milder upon the granting of Magna Charta, and continued so up to the time of the Tudors. From that period they increased in severity to the more equal representation in Parliament effected by the Reform Act, when their execution again assumed a milder form. Under the Plantagenets they

punished with death four kinds of crime; under the Tudors, twenty-seven; under the Stuarts, ninety-six. The criminal laws have been ameliorated with great rapidity in America since the Declaration of Independence, and greatly in Germany and France during the last century. Some believe that this has been done too rapidly. But it is far better that the laws should be even in advance of the public mind, than below it. For if they are below the public mind they can but sink it in the scale of improvement, or destroy at once that respect and ascendancy which the laws should always maintain. With good laws men may become better, with bad laws they will become worse. In any case criminal laws and punishments ought to be in harmony with reason and humanity, and adapted to the condition of the people, according to their moral and mental development.

Applying these general remarks to a criticism of the prison discipline of America, we have to acknowledge that, in comparison with the old modes of punishments, great improvements have been made, but greater ought still to be made.

While in Europe such men as Beccaria, Howard, Romilly, and others, have had the merit of disseminating correct views on this subject, the people of the United States have the merit of attempting to carry them into effect, and by actual experiments, on a large scale, for the amelioration and reformation of criminals, they have proved that men, although criminals, are to be regarded by a civilized society as human beings capable of reformation.

Two systems of prison discipline prevail in America:

the Auburn and the Philadelphia, or the silent and separate systems. Both are entitled to our serious consideration; the experience afforded by them being highly valuable. Both systems separate the convicts by different means: the Philadelphia system by means of bodily separation in partitioned cells; the Auburn system by enforcing silence during the day, and separation during the night. Many persons are shocked at the idea of having the prisoners separated, and say, that society has no right to inflict such a punishment. The idea of excluding any individual from the society of his associates, seems, it is true, very severe, and, to sociable and sensitive dispositions, revolting. But it is necessary that the prisoners should be so far separated from one another as to remove each prisoner from the contaminating influence of others. While society exercises the right to punish criminals, it should not corrupt them, and it would corrupt them if it did not prevent communication among them; because men of a similar character, by coming in contact, would but impel one another in their career, so that not only the less criminal would be corrupted by the more criminal, but even the most criminal would gain in wickedness by mutual contact. If, therefore, society would not subvert the true objects of punishment, and expose the convicts to the danger of becoming more depraved, it must separate them. Both systems have, therefore, been correct in their *design* of separating prisoners; but it seems that the *means* which they have employed to carry out this design, have not been equally correct or successful.

The desired separation has not been fully attained

either in penitentiaries under the Philadelphia or the Auburn systems. The convicts in the Philadelphia prisons have communication among themselves, through the openings for fresh air, through the windows of the cells, and through the apparatus for warming the cells, &c.; and in the prisons of the Auburn system, communications also exist, by signs and other means, among the associated prisoners. Both systems, however, have these merits: 1st, of having prevented, at least in some degree, of corruption the prisoners by separating them; 2ndly, of employing the convicts in useful labour, and thereby relieving society to some extent of the expense of their support; 3rdly, of enforcing greater obedience in the prisoners to the rules of the prison; 4thly, of preventing escapes; and 5thly, of producing, in some instances, reformation. But with all these good results, the prevailing systems require reform in the following points:—

The Auburn, or silent system, ought to be freed from some objections, the most important of which are the cruelty with which the prisoners are punished, and the hiring them out to contractors. In order to avoid the cruel disciplinary punishments, it would be advisable not to concentrate so many convicts in one place, but to divide them into smaller numbers, of about 300 in each prison, and to classify them according to their character and age, in numbers of 20 or 25 in each workshop, so that they may be more readily managed. The bringing together of from six hundred to a thousand convicts at Auburn and Sing Sing, without classification, and without walls around the premises, has been the cause of inducing keepers so frequently to make use

of the lash, that cruel application of the principle of fear. A man may be led by reasonable treatment to his duty, and to moral reformation, but not by the whip. In this respect, however, I have learned, that there has been lately a reformation at Sing Sing. In that prison, the female department appears now to great advantage, from the good conduct and improved moral state of the convicts; and by exercise and cleanliness their general health has been greatly improved. This department has the appearance of a well conducted school during the time of instruction, and of a very orderly workshop during the time of labour. The convicts manifest the highest regard and confidence towards the superintending matrons. All the good effects of the silent system exist there, although severe bodily punishments are avoided; the solitary cell being sufficient as a disciplinary punishment. This improvement is to be attributed, in great measure, to the superior character and ability of the matrons employed, and to the fact, that the number of female convicts commonly under the care of one of them, is only from fifteen to twenty. I observed that the principal matron was able to instruct them, before they began their work, on some moral or useful topic. These instructions facilitate kind treatment, and lead to good order, since the convicts become sensible that the matrons have nothing in view but their good. With such a manageable body of persons, strict discipline is kept up, without recourse to severe punishments. The Philadelphia, or separate system, on the other hand, has a dangerous effect upon the mind of a great number of prisoners, as I shall subsequently show more fully. The separate system will require reformation

and demands the most serious consideration. It seems applicable only to a short term of punishment. The danger to the mind of the prisoner is much increased in those prison buildings which have no yards for the exercise of the convicts, as for instance at Moyamensing, Pittsburg, and Trenton, and in those where sufficient mental instruction is wanting. Exercise and useful mental occupation are of the utmost importance in preserving the bodily and mental health of the prisoners. It is an act of cruelty to cast out into the world discharged convicts, whose health has been sacrificed, or whose minds have been permanently impaired in prison. Too much stress cannot be laid on this point. If the conductors of those prisons effect the separation of the convict, while they deprive him of the only mitigation of his sufferings, exercise in the open air, and in order to force him to penitence, bury him for a term of years in a small cell, in which he is entirely excluded from the salutary influences of exercise, the open air, and the warmth of the sun, so necessary for the support of life, they make that punishment so cruel, that it will frustrate all attempts for the moral improvement of the criminal. Morality is the result of free will, and will not be produced by force or enervating confinement. Can we expect to find a strong resolution to withstand the temptations of vice, in him whose powers of body and mind are gradually sinking under the weight of indescribable suffering? Moral health is intimately connected with physical health; and a mind languishing under the debilitating influence of close solitary confinement, is soon deprived of that healthful energy upon which so much depends in the cultivation of the moral



feelings and sentiments. If all danger of escape, while exercising, can be avoided by means of yards, as at Philadelphia or Pentonville, why should we deny him, whom we wish to improve, an influence so requisite for health, and for the development of the moral feelings?

The criminal has, by his transgression, sacrificed the rights that belonged to him as a citizen, and society may therefore justly deprive him of them; but if, by a mode of imprisonment, it should destroy his mental and physical health, it would not seem like a just administration of the law, but should be regarded as a cruel torture. To such treatment even death would be preferable.

I cannot conscientiously withhold these remarks, since they relate to the moral and physical condition of hundreds of criminals not only in Europe, but also in Pennsylvania and in New Jersey.

*Reformation* is the avowed object of penitentiaries, and many persons, in America and in Europe, have supposed, that it could be accomplished by *separation*, as well in the Philadelphia as in the Auburn system. But this is an erroneous impression. Evil may, in this manner, be excluded, but reformation will not be effected. It is at variance with the nature of the soul, that *moral* improvement can be produced purely by *mechanical* means—by separation in a solitary cell, or through silence enforced by the lash. No instructor would think of using such means for intellectual cultivation. Wise men have sometimes retired from society, in order to undergo self-examination, or to derive consolation for their misfortunes; but their seclusion was *voluntary*, without which nothing *moral* can be accomplished. These convicts, how-

ever, are not confined by their own will, but compelled by a decree of society. Entering the penitentiary, as many of them do, with no mental or moral improvement, unaccustomed to direct their minds, except when tangible things are found to give them employment, or necessity to dictate their course, their idle moments may naturally give room for vague feelings and irregular thoughts; and if the idea of penitence should find place in so disordered a state, it would be so distorted by their mental wanderings, as to be incapable of any permanent effect. They need moral and mental culture in a higher degree than it has yet been possible to afford it to them in some of the American penitentiaries. The benevolent friends of these institutions have, with the greatest difficulty, been able to obtain the appointment of even one moral instructor for each penitentiary, where there are usually more than four or eight hundred convicts; and this single instructor is also occupied during the week in preparing his sermon for Sunday. If we would effect the reformation of the prisoners, and avoid the danger of their minds becoming dull or distracted, we must not be so sparing as heretofore, in furnishing the means of instruction, and such mental training as will enable them to read to advantage the books that are put into their hands. Their suffering is the most severe during the first weeks of their imprisonment before they are accustomed to their situation, and it is, therefore, highly important that they should be immediately enabled to employ their minds during their leisure moments. It is evident from the reports on the number of refractory prisoners, that much more remains

to be done for reformation. The result, as regards reformation, is less favourable than was expected.

If we cannot expect a general or moral reformation, we should at least afford them the opportunity of again becoming useful members of society. The present instructors fulfil their duties most faithfully, but it is evident that their time is too limited; and, on the other hand, the contractors use the convicts only as money-making tools, and therefore they must work so unceasingly from sun to sun, that the clergymen at several of the prisons, in different states of the Union, have complained to me, and justly too, as I am convinced from my own observation, that there was *too little time for moral reformation, and too absorbing a desire of gain*. It will be, therefore, an essential improvement to abolish the custom of hiring them out to contractors, and so to limit the hours for working, that some time may be afforded for instruction and reformation. By abolishing the system of contractors, it will be possible to sell the manufactured goods of the convicts at a fair competition in the market. By such a measure, the monopoly held by contractors, which interferes with fair competition of mechanics, would cease.

If some time could be afforded for instruction and reformation, and if the reformation of the convict could be effected, society would be benefited, even in a pecuniary point of view, as it would be less subject to depredations upon it by unreformed criminals, let loose from prison, only to begin again a new career of crime. I would suggest, that instruction should be communicated during the week to the prisoners by means of lectures, delivered to them mornings or evenings. By

this means both systems would be freed from some defects, and the means of moral culture greatly increased. The value of any system depends not only on the certainty with which convicts are excluded, without severity, and without injury to their health, from evil communications with each other, but principally on the fidelity with which the administration of such a system favours the cause of virtue. The wardens, instructors, physicians, matrons, and keepers should therefore be selected with the greatest care, and kept during good behaviour. They should not be changed with the changes of political parties. This changing of prison officers in America, for political reasons, is one of the greatest of existing evils, and should be immediately reformed. The prisoners must be often visited by the inspectors, and, from time to time, by independent official visitors, to prevent abuses or unauthorized treatment from the hands of the keepers. Without such a vigilant superintendence, emanating from the people, prisons of any system will be necessarily converted into places of torture, for unchecked power will be abused, and no one more requires a salutary check than a prison keeper, who has the disciplinary power over a number of convicts, who often provoke him, and who will be too often sustained in the infliction of unnecessary cruelty by the prejudices or despotical disposition of many men. Without sufficient vigilance by the people over the execution of the criminal law, prisons may easily be converted into a kind of Bastille, and the convicts treated as slaves of the state. Where this watchfulness is wanting, the greatest cruelties may be practised with confidence and impunity within the walls of a

prison. This danger is increased in a community, where the rich may easily escape imprisonment by giving security or bail, and where consequently they feel but little interest for the rights of the poorer classes, who are compelled to undergo incarceration, when accused of crime before trial. Vigilance, in the execution of the law, is as necessary as vigilance in the enactment of suitable laws. The old maxim ought to be ever remembered: *Vigilantibus, non dormientibus servit lex*. Here I may repeat, that the mild administration of the Eastern Penitentiary at Philadelphia is more to be ascribed to the humane and benevolent influence of the Quakers or Friends, and of its officers, than to the separate system of that penitentiary. This system could easily be converted into a means for the most cruel punishment, on account of its secrecy, if such a benevolent and vigilant influence and supervision was not exercised by the Quakers, and by the people in general. It could be made to equal the torture of the Inquisition. No prison system works itself; it must be conducted by good officers and inspectors. The history of all prisons in all countries, and among others of *la maison centrale de Fontevrault*, and of *Hagueneau*, in France, where the silent system is introduced, proves this fact. They were praiseworthy under good officers; they were later cited as very defective under inefficient overseers. At *Montpellier* in France, on the other hand, the female department of the penitentiary exhibits a high degree of perfection, because its administration is highly reasonable. A reasonable government is the soul of a prison. It is of more importance than walls and dungeons towards per-

fecting a system, whose highest aim should be moral reformation, and not solely mechanical labour.

The experience gathered in the field of prison reform has so much increased within the last years, as to render a more complete criticism a task too great for the space allowed for an essay like this, and I shall be able to say but a few words, on the recent movements, regarding the reform of the prison discipline of Europe, an account of which may be expected from me.

King Oscar of Sweden has recommended a careful examination of the Auburn and Philadelphia systems in his work "On Punishments and Prisons," laid before the legislature of Sweden, in the year 1840.

England has begun to introduce the Auburn system in Westminster Bridewell, and other prisons; and the Philadelphia system in the new model prison in Pentonville, near London. But it has improved both systems, by an amelioration of the disciplinary punishments, and by a greater care for abundant instruction. In Westminster Bridewell they have divided the convicts into manageable numbers, in order to control them without cruelty. In the model prison at Pentonville, near London, which has been constructed under the superintendence of the justly celebrated Messrs. W. Crawford, W. Russel, I. G. Perry, inspectors of the prisons of Great Britain, and of Colonel Jebb, the prisoners are provided with a great number of exercising yards; they receive during the week moral and other useful instruction, in a common chapel, by a number of teachers; are visited by their friends once in three months, and remain only one year and a half in prison, being then classified, according to their behaviour, in three classes, and transported

to different places. All these arrangements are made in order to diminish the danger to the mind of the prisoner, which exists in the penitentiaries of the Philadelphia system, but as yet in vain; seven cases of hallucination have occurred there during the first year of the existence of the prison, in spite of all ameliorations and improvements of that system.

In *Prussia* the King took the liveliest interest in all measures calculated to improve the moral condition of the convicts. After an interview which I had with his Majesty, Dr. Julius and myself were invited, some years ago, to present our views upon prison discipline to a section of the Cabinet at Berlin. The subject was debated, and a plan which I suggested, was adopted, but has been again altered. The details of my plan are briefly the following. I proposed a combination of the good features of the Philadelphia and Auburn systems, uniting with them some improvements:—

*The House of Detention* for persons during trial, will be constructed after the separate system, as existing in the model prison at Pentonville, near London (with a sufficient number of yards for exercise). It being self-evident, that persons committed for trial should be kept separated.

*The Penitentiaries* will consist of three divisions. The first on principles similar to the Philadelphia—the other two similar to the Auburn system. The last of the three divisions is to be ameliorated, so as properly to prepare the convict for his return into society. Female convicts are to be kept in distinct prisons,

The cells of the first division will be built after the

model of those of Pentonville; a sufficient number of exercising yards will be provided.

The cells of the second and third divisions will be built more spacious and healthy than in the penitentiaries of the Auburn system, and each workshop will contain only twenty or twenty-five men, so that their superintendence may be more easily managed. The prisoners in these two latter divisions will be divided into classes, according to their character, so far as that can be ascertained, and according to their health and age, and will be employed during the day, and separated in their cells during the night. The prison at Hartford, Connecticut, and the female department at the Sing Sing state prison, satisfactorily prove that under such a regulation the Auburn system can be much ameliorated and rendered more effectual.

The prisoners of all three divisions will have every day one hour allowed for exercise; those of the first division in separate yards, those of the other two divisions in the common prison yard, marching one after the other in different circles.

There will be in each prison a chapel with partitioned seats, similar to those in Pentonville, for the service on Sunday, and for instruction on other days. The prisoners of the first and second divisions will receive one hour's instruction every day, and those of the third will receive more, according to circumstances.

Each convict will be during a short time in the first division in a separate cell, in order to give him opportunity for reflection; but since separate confinement is dangerous to the mind, it will be left discretionary with the physician and officers to remove those prisoners, in due



time, to the other divisions, whose health seems to require it. Every prisoner has it, besides, in his power, by good behaviour and diligence, to be advanced into the second and third divisions. In this way there may be united at last in the third division the best convicts, who give proofs by their conduct of their reformation. Such a prospect is necessary, for it is the hope of a better condition, which makes a hard situation endurable, and which encourages exertion for the purpose of advancement.

The fear of being placed back in a separate cell in the first division, on account of bad conduct, will be sufficient to sustain order, without the severe bodily punishments of the Auburn system. The indicated classification in the two latter divisions will, besides, facilitate this object.

By the establishment of these three divisions in each penitentiary, the punishment will receive such a flexibility, so that it will be possible to avoid the objections of the Philadelphia and Auburn systems, when each is carried out by itself, and by this means it will become possible to unite the good features of both.

The greatest care will be taken in the selection of prison officers: the warden, matrons, physicians, instructors, and keepers; for the spirit that will prevail in the prisons, and the good to be effected, will principally depend upon the intelligence, firm character, and humanity of those persons. All these officers will be appointed during good behaviour, so as to give their whole interest to the institutions, and to secure the great advantage of their increasing experience. In order that prison officers can have an individual influence upon

the convicts, the number of the prisoners in each penitentiary ought not, if possible, to exceed 300; but no fixed number has as yet been agreed upon. The convicts will be under the control of prison inspectors, among whom are to be included physicians; and the time of imprisonment will be much diminished in comparison with former punishments.

Finally, for the purpose of giving employment to *discharged convicts*, *factories* ought to be erected, and farms assigned; and the hope could be entertained that by these means a great evil, the liability of the criminal to relapse again into crime, would, in some degree, be prevented.

By employing discharged convicts who are destitute, upon farms, or in factories, the means will be afforded to them of leading honest lives. The effect of punishment at present destroys the prospects of the convict after he has served out his term of imprisonment. The ignominy of having been a convict follows him wherever he goes, and he will not be trusted. People usually will not employ him, and even if employment be given to him, those who are required to labour with him consider themselves contaminated by his presence, and make common cause against him. Thus it is mainly after he has suffered his punishment that the real hardship of his situation begins to be felt, and he is driven back to crime from necessity. This is an evil which government should do something to remedy. If this effect be produced by punishing him, it is incumbent upon government to do something to counteract it. Not merely from humanity, but from interest; for if the result of punishment is to convert an offender into a con-

firmed and permanent transgressor of the law, it may have been better for the interest and security of society that he had never been punished at all. To prevent discharged convicts from relapsing into crime becomes, therefore, a solemn duty on the part of government. A duty which it owes to society, and which springs from the very necessity which gives rise to the institution of government.

It is objected, that discharged convicts labouring together in factories, or on farms, will become acquainted with one another; but this is not a serious objection.

It is to be remembered, that prisoners become known as such by their public trial; that they have communications, and know each other in prison, and that, when discharged, and returning to their former home, they are known to have been in prison. The question is simply then, whether, as discharged convicts, they shall be left to destitution, or whether they shall be aided in leading honest lives under some sort of control? If by employment in factories, or on farms, the incentives to crime are diminished, and the stimulus to honest industry increased, corruption is less to be feared; and it may be avoided in some degree by the necessary imposition of silence during the working hours. The safest way for reformed discharged convicts is, openly to acknowledge that they have been imprisoned; by this means they free themselves from the influence of other convicts, and regain easier, by their candour, the confidence and sympathy of the best class of the community. No contractors will of course be allowed in those factories, for the reasons that have been enumerated. All the profits of labour are to

be divided among the persons employed, and they could, under proper direction, comfortably maintain themselves by their combination of labour in factories and on farms.

Those discharged convicts who find employment elsewhere, are of course at liberty to follow their own choice.

For further information upon this subject, and particularly in regard to the arrangements which are to be made, in order to prevent the danger to mental health, which exists in the Philadelphia system, I refer to a work on the penitentiaries of the United States and Great Britain, which my brother and myself have published in Germany, under the auspices of his Majesty the King of Prussia; I will take the liberty, however, of calling attention to the medical part of the work, wherein my brother states, that cases of insanity have occurred more frequently in prisons where separate confinement has been adopted, than in prisons arranged on a different plan; establishing this position by extracts from public documents, and showing that the numerous cases of mental derangement which have been observed among convicts confined separately, are not to be ascribed to other causes, but that separate confinement itself is productive of insanity, or in other words, that the uneducated prisoners, who are possessed of vivid imagination, or endowed with strong passions, suffer in many instances from being isolated and alone, through fright, anguish and religious scruples, &c., &c., so as to bring on mental derangement. In connexion with this statement it will not be regarded, I believe, out of place, to give his views on the classification of prisoners, in

conformity, in the main, with my proposals on the subject. He says : "In consideration of the ends of imprisonment, such as we are justified in expecting with regard to moral improvement, as well as to the health of the convicts, I am of opinion, that none but those prisoners should be kept in separate confinement, who would exert an obnoxious influence upon their fellow prisoners, who, however, are susceptible of reform by means of education, &c., under this mode of imprisonment. I deem it therefore advisable not to subject to separate confinement those convicts, first, who are believed to have reformed; second, those whose state of health suffers from separate confinement; third, those who are condemned for life. This classification appears to me as natural as it is necessary, since it is founded upon the difference in the moral education, in the health, and in the nature of the crimes committed. If separate confinement should be introduced in Germany, I am convinced the necessity would soon become apparent of employing at labour in common those prisoners whose bodily and mental health required it." I conclude these extracts with one of his suggestions respecting the classification of convicts: "It is necessary to fix the time of separate confinement in each case individually, so as to leave it at the discretion of the physician, and other superior officers of the prison, to decide at what period of imprisonment the convicts should be transferred from the first division to the second. The *term* of imprisonment should alone be fixed by the Court." I omit the reasons given for this proposition in the work.

My brother's views on the influence of separate con-

finement on the health of convicts are corroborated by more recent works on this subject, by Swiss and French writers. Monsieur M. Ch. Lucas, speaking of the unsatisfactory results of the separate system, introduced since 1834, in a prison at Lausanne in Switzerland, in regard to the moral reform and the health of convicts, cites these passages from a Swiss work: "After a conscientious and intelligent trial of silence and solitude for nine years, thirty-one cases of mental alienation and numerous cases of recommitments have been observed, which are but so many facts protesting against the Pennsylvania system." Monsieur Lucas then remarks: "Who is the author of this work? Dr. Verdeil, a member of the Great Council, vicepresident of the Council of Health, and Commissioner of the prisons who, nobly coming forward to fulfil his duty as an honest man and a Christian, exclaims: "After such facts, is it not necessary to modify this system? As for myself, although once the zealous partizan of a system, which would, as I was assured, regenerate the corrupt, and intimidate the disobedient, I was among those who laboured for its introduction; but seeing now my error, I feel it to be my duty to make known its faults," &c.

In *France*, the reform of prison discipline was debated before the Chambers, and before the *Académie française*, in the beginning of the year 1844, in the most open and searching manner. At the conclusion of the debates, the Chambers adopted the separate system, only for the houses of detention, but *not* for their penitentiaries; and before the *Académie*, Monsieur Lucas, who is among the most eminent of that body, has, as I perceive from a letter and a work which he has done

me the honour to send me, advanced views similar to those I had suggested in Berlin; but M. de Tocqueville adhered most closely to the Philadelphia system. In the excellent and lucid work of M. Lucas, and of M. de Tocqueville, entitled, "*Exposé de l'état de la question pénitentiaire en Europe et aux États Unis*," M. Lucas shows that separate imprisonment has produced insanity, and corroborates the opinion of Dr. Verdeil by copious extracts from reports made by the physicians of the Philadelphia penitentiaries, and from statements published by private individuals in the United States.

After the brief review of some of the merits and defects of the existing penitentiary systems of that country and of Europe, it is apparent that much is yet needed in the way of reform, that reform should be effected by adopting only what has been good in former experiments; and for the rest, making the proper attempts to improve and complete them. On the way of experience, we must practise long in rough experiments, until at last the discovered elements are brought to act in harmony. Every philanthropist, considering the improvements already introduced in America and Europe, must rejoice at the progress humanity has made since the time when Beccaria, Howard, Sir Samuel Romilly, Sir George Paul, Mabillon, Count Vilain, and others, who are to be looked upon as the pioneers in the work of prison reform, were ridiculed as visionary enthusiasts.

When we look back upon history, and observe how slowly humanity has struggled onward through the long lapse of ages; how many thousands of wretches have been left to languish in unwholesome dungeons, to be

racked with excruciating tortures for imaginary crimes, and to perish neglected and unpitied; how many innocent persons from the indiscriminating vengeance of the law, have been made to suffer all the penalties of guilt, it is consoling to reflect that civilization has advanced so far as to demonstrate that even the guilty are worthy of consideration, that human institutions are yielding to the tolerant spirit of Christianity, and becoming so mild towards criminals and to inhuman beings, so humane as to attempt even in punishing to improve them. In the progress of humanity about the last to feel its influence has been the incarcerated felon. He has violated the law, and it has visited him less in the spirit of justice than of vengeance. It has sought less his moral elevation than to punish him for what is past. He and the law have become natural enemies. The lash of the keeper is presumptively administered for his good, but his stripes are by no means convincing arguments. They may reduce him to obedience, but they cannot soften his heart, or exalt his moral nature.

To govern him, it has been supposed necessary first to degrade him, and the very means employed to reduce him to subjection have been calculated to destroy every virtuous emotion within him. The effect of such a mode of prison discipline is to render him more callous, and when he is again cast upon society, he has become a more dangerous enemy to it. Branded as a convict, he is shunned by his fellow men, and from necessity, a necessity rendered natural by a feeling of retaliation, he preys upon them in return. He returns but to play a more extended part in the drama of crime. Crime has become to him a business and a destiny. Its



hazardous pursuit is a necessary aliment to his mind. Like every unnatural means of excitement, it becomes essential to the cravings of his diseased appetite, and he plunges deeper in guilt, until he is again shut out from intercourse with men, by further perpetual confinement. The object of prison discipline should be to raise the fallen wretch, to arrest his progress in the incipient steps of crime, to prepare him for his return to society, and fit him to enjoy its blessings. The most degraded criminal is not insensible to kindness or sympathy. The very fact that he does not meet it in his prison, nor receive it from the world, drives him to seek it among his accomplices in guilt. Perverted as his moral being has become, he but obeys one of the strongest impulses of nature, and the very impulse that weds him to crime, would, if properly directed, become a means to raise and restore him. He should feel that the virtuous part of society sympathizes in his fate, and takes an interest in his regeneration.

To know how, or in what manner, to approach criminals, to use means by which their better feelings may be acted upon, and to exercise those influences by which their moral nature may be cultivated, are subjects yet before us. The improvements hitherto introduced have had reference rather to the structure of prison buildings, the most efficient organization for the purposes of manual labour, and the best means of securing and enforcing obedience. They relate rather to the government of prisoners as a mass than as individuals, with different habits and different characters. A wide field is therefore open for the labours of the philanthropist, and one that promises an abundant harvest.

As it is an object to which I have devoted some years of my life, I cannot express how deeply interested I feel in the result of prison reform. If pursued in a practical and philanthropic spirit, in which misdirected and injudicious sympathy shall not be allowed to interfere with, or control, the great ends of justice, I am satisfied that its benefits will be equally shared by the criminal and by society.

---

REMARKS ON THE AMERICAN NOTES BY CHARLES DICKENS,  
IN AS FAR AS CHAPTER SEVENTH—PHILADELPHIA AND ITS  
SOLITARY PRISON—IS CONCERNED.

SINCE the views expressed in the chapter referred to will have some influence in forming public opinion in regard to the prison discipline, it may not be deemed presumptuous in me, if, in reply to Mr. Dickens, whose genius I admire, I submit to the public a few observations on the same subject. He condemns the Philadelphia prison (the Eastern Penitentiary) in such powerful language, that some, adopting his views without reflection, might suppose the subject no longer open to discussion. This being the case in regard to so important a subject, impartial investigation is the more imperiously demanded. This system of imprisonment is fast spreading over the civilized world. It has been extensively—but with great modifications—adopted in England, in France, and in Prussia. It is, therefore, a system on which the moral and physical condition of thousands of criminals depends.

In the discussion of this subject, we must first direct

our attention to the careful examination of the facts. Mr. Dickens calls the prison at Philadelphia a "solitary one," and says, "that the prisoner sees the prison officers, but, with that exception, he never looks upon a human countenance or hears a human voice". This, however, is not the case. It is not a "solitary", but a separate system. Its design is to remove each prisoner from the contaminating influence of other criminals, by means of bodily separation in partitioned cells; but while it carefully seeks to exclude all evil influences, it opens the avenues of reformation. The prisoners are visited several times a day by the keepers, as often as possible by the warden, physicians, and moral instructor of the prison, and weekly by the inspectors. They are also visited, from time to time, by the so-called official visitors, namely the governor, speaker and members of the Senate, the speaker and members of the House of Representatives, the secretary of the Commonwealth, the judges of the Supreme Court, the attorney general and his deputies, the president and associate judges of the courts, the mayor and recorder of the neighbouring city, the commissioners and sheriffs of the several counties, the acting committee of the Philadelphia society for the alleviation of the miseries of public prisons, and by those strangers who, like Mr. Dickens, received a written permission from the inspectors. Visited then as they are, by persons who take a human interest in them, their confinement cannot be called solitary. It ought to be called separate. But Mr. Dickens considers the prisoner perfectly solitary and entirely excluded from all communication with his associates. On this supposition he has given us a skilful description of the feelings of the convict, when first

he enters this "scene of his captivity"; of the images that rise before his mind; of the awful stillness that surrounds him, and of the nervous excitement by which he is finally impelled to cry out for employment. All this may be true; but it does not arise from a separate situation. The fact is, on the contrary, that the convicts in the prison near Philadelphia may have communications among themselves; 1st, through the openings for the fresh air; 2ndly, through the windows of the cells; 3rdly, through the apparatus for warming the cells, and, 4thly, through the water pipes. In the newest English prisons of the separate system, communications also exist by the same means, with the exception of the windows, instead of which the prisoners can communicate with one another in a common chapel, to which they are on Sundays conducted.

Mr. Dickens says farther, "that this system makes the senses dull, and, by degrees, impairs the bodily faculties." He is right in saying this, but still he overlooks almost entirely the fact, that each of the lower cells in the seven wings of the prison at Philadelphia has a yard attached to it, and argues, as if the prisoners were buried alive and for ever excluded from the salutary influences of exercise in the fresh air and of the light and warmth of the sun. If this was the case, I would condemn the prison discipline in question as fully as Mr. Dickens himself does.

But let us consider for a moment the actual condition of the convict in the Eastern Penitentiary of Philadelphia. He lives in a cell, which possesses the conveniences of life—the important properties of ventilation, light, warmth and cleanliness in much greater

perfection than the ordinary dwellings of the poor. In it he labours by a voluntary principle in order to pass his time, and not as a slave, since he is only sentenced to labour, not to hard labour. His occupation is interrupted in the middle of the day by the exercise of one hour in the open air. This he takes in the yard attached to his cell—eighteen feet in length (it might better be thirty), and about eight feet in width, surrounded by a wall twelve feet in height. In this yard he sees, it is true, only a few square yards of earth. But in the spring time, several prisoners amuse themselves by sowing flowers, the seeds of which are given to them by the keepers, for their good behaviour. The exercise which they here take is healthy and refreshing. And while the vigour of their bodies is thus in a measure preserved, they are nourished by very healthy food, their apparel is kept in order and they are excluded from all that would injure their health. A life of confinement is not as healthy, of course, as that of freedom; but where a sufficient opportunity is afforded for activity and the imprisonment is not too long, the danger of disease is greatly diminished. The prisoners appear pale indeed, but the official reports of the physicians show that the state of health in prison is not alarming, if the imprisonment is not one of many years. This result is particularly attributed to the means of sufficient exercise.

Exercise is of the utmost importance in preserving the bodily and mental health of the prisoners. Too much stress cannot be laid on this point. Unhappily overlooking it, exercising yards have entirely, or for the most part, been omitted in some new penitentiaries of America.

Frequently, having spent entire days in visiting the convicts, examining their work, and conversing with them, I have stepped into one of the yards to see the effect of the change; and as I breathed the pure air, and saw the blue sky above me, clearer and more refreshing on account of the happy contrast, I could feel the force of the sentiment of Schiller, the German poet, in which Mary Stuart breaks forth on leaving her prison:

“Does the sad vault no longer hold me?  
Let me, in full and thirsty draughts  
Drink in the free and heavenly air.—  
Does not the wide canopy of heaven surround me?  
My looks, free and unconfined,  
Wander over immense spaces.”—

The reader will pardon this digression. In his happy situation he may not easily comprehend the effect of the fresh air under the open sky upon the feelings in such a condition, but his heart will readily respond to the words of the poet.

But the censure of Mr. Dickens cannot be attributed to the benevolent design of the Philadelphia Eastern Penitentiary, where these yards are provided,—a fact which seems not to have been sufficiently observed by him. It, however, may be applied, as we before intimated, in some cases of the separate system, in America. There are no yards for exercising the prisoners in the Western Penitentiary at Pittsburg, the Moyamensing or county prison near Philadelphia, and the penitentiary near Trenton, New Jersey, &c. There are great empty spaces surrounding the several wings of these prisons which are enclosed by walls, twenty feet in height. These spaces are now of no use, but by arranging them into sepa-

rate yards, they might be employed for preserving the health of the prisoners. Mr. Coleman, the physician of the penitentiary near Trenton, justly complains of the evil effects of the separate imprisonment on the convicts under his care. He says that they suffer all the evil consequences that can result from living constantly in the shade, deprived of all physical action. As soon as exercising yards in sufficient number shall be used, the evils which he complains of will be essentially remedied. I venture to make these remarks in order, if possible, to draw the attention of the friends of these institutions to this subject, since, by a small appropriation, their legislatures might supply the required means.

Mr. Haviland, the architect himself, and the wardens and inspectors of several of these penitentiaries, have agreed with me in recommending the use of exercising yards.

Mr. Dickens appears to be particularly shocked at the idea of having the prisoners separated, and says, that society has no right to inflict such a punishment. The idea of excluding any individual from the society of his associates, seems, it is true, very severe. But this point requires careful examination. The criminal is unfit to live in a society based upon law, and society can compell him to leave it. Instead of this, penitentiaries have been introduced in which an opportunity of reform is afforded him, and the possibility presented of his again returning to society. The question then is, whether, during their imprisonment, the prisoners should be associated together or separated. Here it will be acknowledged, as mentioned in my previous article, that society has only a right to punish, but not to corrupt

them. It does corrupt, if it does not prevent communication among them. If, therefore, society would not subvert the object of these institutions, and open to the convicts the channels of depravity instead of reformation, it must furnish the means for their separation.

The most important objection which Mr. Dickens makes, is that he believes that "the punishment in question wears the mind into a morbid state," without accomplishing the desired reformation. The conversations which he gives for illustrating his views would, at the utmost, only prove the state of feelings in which some were placed. I could relate many conversations with prisoners, who had not been a long time there, which showed that they were as contented as we could expect to find them, in such a situation. For example I asked one of the prisoners, a barber by trade, who supplied the other prisoners with razors, and who was at the time shaving one of the keepers, in his cell, whether it was not dangerous to intrust the convicts with such instruments. He replied laughing, "nobody would cut his throat in this institution, for it was too comfortable a place." Another prisoner, a young German, took the greatest pleasure in showing me the flowers in his yard, praised the kindness of the keeper who had given him the seed, and said that this institution was, in every respect, preferable to a large prison in Germany, of which his father was keeper.—Two of the most intelligent and best educated convicts, formerly professional men, assured me that, although this kind of imprisonment bore indeed very heavily upon the feelings on account of its monotony, yet they would prefer it to



any other. It separated them, they said, at their will from the other convicts, so that they could not be annoyed by them while they remained there, nor recognized after they should have left their confinement.—But among those who had been confined more than a year, I found much of that nervousness and depression of spirits, of which Mr. Dickens justly speaks. That moral reformation is not so much affected as desired, is evident from the reports of the Philadelphia penitentiary on the number of refractory prisoners.

It is evident that more might yet be done there for reformation. But this result is still less favourable in prisons of the Auburn or silent system. Thus, for example, the warden of the Wethersfield prison, Con., which is conducted on the silent system, Mr. Pillsbury, who has faithfully performed his duties for many years, told me, that “he supposed that, of a hundred convicts, one might be reformed so as to be prepared for heaven, and two for the society of earth.”

The report of the penitentiaries show besides that separate confinement is not without danger to the mind of the prisoner. This result is found by physicians to be in a measure owing to the want of mental improvement. If we would avoid the danger of seeing their minds becoming dull or distracted, we must not be so sparing as heretofore in furnishing the means of instruction. It is important that they should be enabled to employ their minds during their leisure moments, otherwise mental hallucinations may sometimes be expected.

At this point I must be permitted to remark concerning the preaching in the Eastern Penitentiary. The

annual reports of the board of managers of the Prison Discipline Society in Boston constantly object to the separate system because there is no common chapel, and because the convict can only receive religious instruction in his cell, by personal intercourse with the instructor. In order to estimate correctly the importance of this objection, I have often visited those penitentiaries on Sundays. I found in several corridors gentlemen preaching, who voluntarily assisted the moral instructor; and having heard the objection that prisoners in the remotest cells were not able to hear the preacher, I went down to the farthest end of one of the corridors, and observed behind almost every iron grating a prisoner leaning against it and listening attentively to the sermon. Each outer cell door was partly opened in the direction of the clergyman. Going into one of the remotest cells, I heard the sermon without difficulty. I became convinced that there was much attention and devotion among the prisoners. The words of the preacher, breaking the general silence, sounded through the lonely cell like a message from a better world. In order to receive a proper impression, the prisoner must be inclined to listen to the sermon. The stillness of the cell produces this effect. His attention is not distracted by any outer object: in his cell he is alone with his thoughts directed to God; his emotions do not make him blush or expose him to the ridicule of his rough companions; and his devotion is free from hypocrisy, since no human eye sees him.

A great number of the prisoners seemed to be sincerely penitent, if an open confession of crime can be taken as an indication. All of the convicts with whom

I spoke, with the exception of three, told me openly of their crime.

Mr. Dickens says that the separate imprisonment is a singularly unequal punishment and that there is no doubt that it effects the worst men least. If he means by this that it effects the roughest men least, he is correct. The educated and formerly wealthy persons, whose feelings are more refined and who are accustomed to the luxuries of life, feel this punishment, which treats all equally, more deeply than less educated or poorer criminals. But this is in accordance with the demands of justice, since their crimes find less palliation on account of need or neglect. In order to elucidate this subject, let us inquire farther concerning the nature of the punishment. The peculiarities of other kinds of punishment, which tend to excite the interest of the rougher class of criminals, as, for example, the boldness, pride, or boasting, displayed to the keepers, calculated to attract the admiration, or rouse the evil passions of their companions; all the excesses of drinking, &c., to which they may have been formerly accustomed, are entirely prohibited during their imprisonment. Every attempt to escape, or to oppose the regulations, is rendered fruitless by the watchfulness of the overseers, and by the certain course of the punishment. The convict feels himself powerless before the quiet and steady exercise of justice, and humbly acknowledges the supremacy of the law. It is more a punishment of the soul than the body. The latter is comparatively well taken care of, by means of good nourishment, cleanliness, exercise, &c., the whole severity falls upon the mind and conscience.

Since all crime originates in a corrupt state of the mind, which not properly subjects passions to reason, that punishment would seem to be the most proper, which is directed against the mind,—but without injuring it. It strikes at the very source of crime, and seeks to divert the mind into its proper channel. To succeed in this undertaking, more mental culture and physical exercise is required.

In the same proportion as the moral improvement of the convict increases, the painful effect of the punishment will decrease. For then he will become gradually more calm in his feelings, and more reconciled to his situation.

The weight of this punishment is, as above mentioned, particularly felt when the term of confinement exceeds one or two years; it is severe on account of its monotony. But if the term is only a year or, as in England, a year and a half, then it seems to lose a great deal of its severity, through the hope of release, and the force of habit adapting itself to the situation, and by the cheerful influence of instruction, labour, and the calls of official visitors. When the term of confinement exceeds one or two years, these things are deprived of much of their consoling influence, and the mind seems to lose its elasticity. Then the greater number of prisoners sink gradually into a melancholy state, which has a tendency to weaken their nervous system. Justice, therefore, seems to demand that the duration of the punishment should be limited. It is my opinion that separate imprisonment is too severe to be adopted as a punishment for life, or even for a term of some years. All the advantages derived from the first year

will be lost in the despondency which the later will produce.

This is equally a subject of interest to religion, humanity, and civil order. The separate and silent systems, if improved by experience, are capable of practically realizing the benevolent principle of rendering good for evil, so that, in the conflict with the wicked, we may remain pure in mind, will and action.

---



# V.

## GERMAN AND ENGLISH CIVILIZATION;

### THEIR SIMILAR DEVELOPMENT

THE RESULT OF A SIMILAR ORIGIN, CHARACTER AND HISTORY.

---





# GERMAN AND ENGLISH CIVILIZATION;

THEIR SIMILAR DEVELOPMENT THE RESULT OF A SIMILAR ORIGIN,  
CHARACTER AND HISTORY.

---

This Essay discusses the views alluded to in the dedication.

---

## 1. NATIONAL CHARACTER AND POLITICAL INSTITUTIONS.

IN order to show that there always has existed, and still continues to exist, a coincidence in the origin and progress of civilization in Germany and England, it is necessary to consider the ancient history, the national character and the political institutions as well as the languages of the nations; a resemblance in various customs and regulations and the affinities of language clearly indicating the original relationship of the Germans and the English.

In the observations that I am now about to make, I trust that I shall not be accused of speaking too highly of the merits of my own country; but an explanation of the subject in question requires that these observations should be made. And this necessity will become more apparent, when we consider that these

two nations have a common Saxon origin, and that in discussing the character which has developed itself in these countries, we ought not to forget, that whatever is said here of Germany applies equally to England.

It is well known, that the Angles and Saxons, who settled in England, were German nations; and that we are thus brought, with respect to England, exactly to the same point from whence we begin in examining the history of Germany.

The history of the origin, and of the earliest state of the German nation, is involved in impenetrable obscurity. This must not surprise us; for every nation, as long as it lives in a half-savage state, without a written language, neglects every record of its history beyond mere traditions and songs, which pass down from generation to generation. Our authentic history, consequently, commences at the period when our ancestors, possibly after they had dwelt for centuries in our native country, first came into contact with a nation that already practised the art of writing. This happened through the incursion of the Cimbrians and Teutonians into the country of the Romans, in the year 113 before the birth of Christ. But the source whence we should draw most copiously, is precisely here dried up—the books of the Roman author, Livy, which treated of this war, having been lost.

After the Cimbrian era, another half century passes before the Romans again mention the Germans. It was towards the middle of the last century before the birth of Christ, when Julius Cæsar advanced to the frontiers of Germany. He himself mentions having fought with Ariovistus in Gaul, and afterwards with some German

tribes on the left bank of the Rhine. Fortunately for us the German nations fell under the observation first of one of the most celebrated men, and afterwards of one of the most celebrated writers of antiquity—of Cæsar and of Tacitus: to them we must refer. Cæsar notices chiefly the Suevi; and Tacitus, the Saxon tribes. Yet in the detail it will be perceived that the essential fundamental character of both was the same.

The work of Cæsar gives a picture of the civilization and barbarism of his age, while it professes to be only an account of his campaigns in Gaul.

Cæsar, for instance, is not giving an avowed description of the Germans, when he gives us the reply of Ariovistus; yet how could he have described the military force of the country more strongly? "Fight us, if you please," said the bold leader; "you will learn to know what we, the unconquered German warriors, are able to do by our valour; we are a nation that have been under no roof within the last fourteen years."<sup>1</sup>

The German nations became in the course of time sufficiently well known to the Roman people. They destroyed five consular armies, encountered Marius, contended with Julius Cæsar, and under Arminius annihilated Varus and his three legions.

More than a hundred years after the Germans had attracted the notice of Cæsar, they were delineated by the masterly pencil of Tacitus; and that in a professed work on the subject, "*De situ, moribus et populis Germaniæ.*" We value Tacitus for the treasure he has

<sup>1</sup> "*Quum vellet, congredieretur; intellecturum, quid invicti Germani et exercitatissimi armis, qui intra annos quatuordecim tectum non subissent, virtute possunt.*"

left us in his description of Germany and its people. His deep feeling for simplicity of manners, and healthy energy of nature, had made him a warm friend towards the German natives.

Whatever value we may justly affix to the account of Cæsar, the treatise of Tacitus is still more distinct, complete, and important. The whole has such a reference to the manners and governments of Europe, that every part of it has been examined by antiquarians and philosophers; and there is no labour which we must not willingly employ, if it be necessary, to familiarize our minds to a treatise so important.

Tacitus justly considers the German nation as an aboriginal, pure and unmixed race of people. (Cap. II et IV.)

He describes them as vigorous, brave, sincere and freeminded. He says that among them morality exercised greater power than did the whole code of laws among other nations of antiquity.<sup>1</sup> When we regard these points of resemblance in the Germans and their tribes the Angles and Saxons, in connection with the pursuits in the prosecution of which they have been most distinguished, namely navigation and agriculture, war and the chase, we cannot be surprised that there is also a remarkable coincidence in the German and English life and character.

The Romans called our nation, from its warlike mode of thinking, *Germans*,<sup>2</sup> and many individual tribes are mentioned by them in the northwest of Germany,

<sup>1</sup> Taciti Germania Cap. XIX: "Plus ibi boni mores valent, quam alibi bonae leges."

<sup>2</sup> Most probably from the word *ger*, spear or lance, and the word *man*, the man, the lord or chief. Therefore, in any case,

between the Lower Elbe and the Lower Rhine, without distinguishing them by a collective name. Subsequently, in the second century after the birth of Christ, the name of *Saxon* occurs in these districts, and in still later times it becomes the *dominant* title in the above-mentioned tracts of country; for in the third century, the tribe of Saxons spread forth from Holstein over Lower Germany, and gave its own name to all those tribes which it conquered or united by alliance. It has been customary to apply the name of Saxons, for even the earlier periods, as the collective appellation of all the tribes of Lower Germany, and thereby to express the very opposite character they presented in their whole mode of living to the Suevi. For as these unwillingly confined themselves to a fixed spot, and, by their greater exercise and activity, kept themselves constantly ready for every warlike undertaking, so, on the other hand, the nations of Lower Germany had early accustomed themselves to settled dwellings, and had made agriculture their principal occupation. They dwelt upon scattered farms; a custom very useful for agriculture, and still prevailing in some parts of Germany, in England and the United States of America; each farm had its boundaries around it, and was enclosed by a hedge and bank of earth. The owner was lord within his farm, and by voluntary union with a number of other proprietors was attached to a community; and several communities again were bound to a *Gau* or county. The name of Saxon is, according to all probability, to be

a warlike title of honour, which distinguished the manliness of the nation.

derived from the short swords, called Saxens, (Sahs,) of this people.

Saxon institutions were not the most favourable for the exercise of the strength of a nation against the enemy. But it gives a strong and self-dependent mind to the individual man, to find himself sole lord and master upon his own property, and knowing that it is his own power that must protect wife and child.

The Germans loved the open country above every thing. Tacitus says (Cap. XVI), they selected their dwelling wherever a grove or spring attracted them. Advantage and comfort were consequently sacrificed to their love of open and beautiful scenery, and it is probable that they so ardently loved their country from its presenting them with so great a variety of hill and dale, wood and plains, and rivers in every part.

This strong love of nature, which may be traced from the very first in our forefathers, is a grand feature of the German and of the English character. As long as we retain it, it will preserve us from sensual enervation and the corruption of manners, wherein the most cultivated nations of antiquity, by excess of civilization and luxury, and compression into large cities, gradually sunk.

Next to war, the most favourite occupation of the Germans was the chase; and that itself was a kind of warlike exercise. For the forests concealed, besides the usual deer, also wolves, bears, bisons, elks and wild boars.

No nation respected the laws of hospitality more than the Germans. To refuse a stranger, whoever he might be, admission to the house, would have been dis-

graceful. His table was free and open to all, according to his means. (Taciti Germania Cap. XXI.)

Whilst women were regarded as little better than slaves by the ancient Greeks and Romans, the Germans, on the other hand, even in the most barbarous period of their history, treated their wives, as Tacitus tells us (Cap. XVIII and VIII), with great respect and regarded them in the light of their best friends. The same fact we observe yet in all nations of Saxon origin.

This veneration for the female sex in its human dignity, combined with the strongly impressed love of arms, of war, and manhood, this noble feature in the German nature, which elevates him so high above the—in other senses, so gifted—Greeks and Romans, shows clearly that nature had resolved the Germanic races to be the entire men who, by the universal cultivation of the human powers, should, at some future period, produce an age, which, as now, in its liberal and many-sided or multifarious views, in Germany, England and the United States of America, should surpass that of the Greeks and Romans.

The religious worship of the Germans attached itself to, and was associated with, nature. Although but rudely so, they yet had the presentiment of an infinite and eternal divine power in their breasts; for they considered it at variance with the dignity of the divinity to enclose him within walls, or to represent him in a human shape. They built no temples, but they consecrated to holy purposes groves and woods, of which nature had formed the pillars, and whose canopy was the infinite heaven itself.<sup>1</sup>

<sup>1</sup> C. C. Taciti Germania, IX: "Ceterum nec cohibere parietibus

This natural feeling, and this purity of their religious ideas, made them, in after times, peculiarly adapted for the reception of Christianity.

Their political institutions were the following:—

The peculiarity of the Saxon people consisted in their free form of government, a constitution most conformable to their origin, springing as they did from the union of the heads of free families, each of whom ruled his domain according to the ancient patriarchal form.

A number of farms of great and small landowners, united by close ties, constituted a community (*Gemeinde*); several communities a league of the hundred (*Markgenossenschaft*), which exercised within a larger circuit the common right of self-government; and, lastly a number of these formed the larger confederacy of a county (*Gau*), formally united for protection against every enemy, and for internal security both of life and property.

Meantime the contrast between their self-government and their domestic life is not to be mistaken. In the latter we find the greatest freedom and independence of the *individual*; in the former we perceive the combined power and unity of the *whole*, wherein the individual self is merged.

In earlier times, perhaps, there never existed in many circuits, and during peaceful relations, a more extensive and firm confederacy than that of the *gau* or *county*. But danger from without and relationship pro-

Deos, neque in ullam humani oris speciem assimilare, ex magnitudine cælestium arbitrantur; lucos et nemora consecrant, Deorumque nominibus appellant secretum illud, quod sola reverentia vident."



duced, without doubt, the establishment of *unions of whole tribes*.

As chief of the county a judge was elected from among the most experienced, who probably may have borne in ancient times the name *Graf*, count. Hundreds were subdivisions of the county, probably consisting originally of a hundred farms, whose chiefs were the *Centgrafen*. These gave judgment in trifling affairs like the justices of the peace, and in matters of more importance they were the assistants of the *Gaugrafen*. But the people, when organized in council, exercised criminal jurisdiction in open court, like a sort of jury.<sup>1</sup> The occupation of these functionaries was not limited to their judicial employments, but they had the guidance also of other affairs in the community; and, together, they formed the *Principes* of the district, the first among their equals, whence is derived the German word *Fürst* (prince). We cannot ascertain whether these chiefs bore everywhere, or merely among some tribes, the title of *King*; the Romans called them *Reges*, because they found this name most applicable, and in contradistinction to the transitory ducal dignity, which terminated with the war.

The *National assembly* counselled and decided upon the most important affairs. All historians, from Cæsar and Tacitus downwards, record the fact that, whilst in Greece and Rome political power was exercised exclusively by the inhabitants of the *capitals*, the Germans, on the other hand, from the earliest times gave a share

<sup>1</sup> Taciti Germaniæ Cap. XII: "Licet apud *concilium* accusare quoque, et discrimen capitis intendere". Cap. VII: "Ceterum neque animadvertere, neque vincere, nec verberare quidem, nisi sacerdotibus permissum."

of political power *to each freeman of the whole nation and of a wide country*.<sup>1</sup> Their states rested from beginning on a large basis. Their element of life was individual independence. For the arrangement of their public affairs, as Tacitus tells us in his *Germania*, chap. XI, all freemen of their tribe met and voted on a footing of perfect equality. Amongst them all fathers of families and all men who had taken up arms for the public defence met in council; afterwards they sent representatives to the legislative bodies of the several states and of the united German empire, until, after an existence of a thousand years, weakened by discord, it was dissolved in 1806 by Napoleon. The German tribes have introduced into the world the principle of representation of the people. It is well known that this institution was carried to England by the Angles and Saxons, and that, from the inherent love of liberty among the Saxons, for which all German tribes were renowned, their Norman conquerors were never able entirely to eradicate it; and after the lapse of ages it was brought to the American shores by the early English settlers, and acquired in these two countries its high state of development. Many Englishmen and Americans, who exult in the political advantages of their own countries, perhaps frequently forget, that the germs of these advantages existed in the earliest history of their Saxon

<sup>1</sup> C. Cornelii Taciti *Germania* XI: "De minoribus rebus principes consultant, de majoribus *omnes*; ita tamen, ut ea quoque, quorum penes plebem arbitrium est, apud principes pertractentur. Coeunt, nisi quid fortuitum et subitum inciderit, certis diebus, quum aut inchoatur luna, aut impletur, nam agendis rebus hoc auspicalissimum initium credunt."

ancestors. It is, however, a subject of serious reflection, how unfavourable circumstances have been during a long time to the progress of free political institutions in the country which gave them birth; until at present the constitutional life is happily realized in Prussia.

## 2. LANGUAGE AND LITERATURE.

LET us now consider the affinities of the German and English languages, and then proceed to a review of some portions of the literary treasures, contained in the German language. It is evidently not necessary for us to dwell also on the English literature, which is sufficiently known to the English reader.

The investigation of the language and literature of a people is of absorbing interest, since it involves a consideration of the early manifestation and gradual development of the genius of that people. This genius, ever to be regarded as the best criterion of the soul and character of a nation, has developed itself, with remarkable freshness and profusion, in the German language and literature.

We regard the language of a foreign country as the key, by which we have access to its literary treasures. An acquaintance with the literature of a foreign country excites the mind to an extent quite incalculable. It is manifest that we arrive at truth most directly by an accurate perception of contrasts, and contrasts are necessarily great in the literature of different nations. The human mind gains, therefore, clearness and variety of perception as it becomes intimate with the literature and genius of foreign nations.

A study of the German language moreover essentially contributes towards acquiring an accurate knowledge of the origin and subsequent formation of the English language. A reference to that source from which his mother tongue has sprung is therefore a necessary accomplishment to every educated Englishman. The English language is so copious because composed of various elements and particularly of the Saxon and Norman dialects, which latter is derived from the Latin. It is well known, that the Saxons and the Angles,—who introduced the Saxon language from the land of the Angles and Saxons, situated in the north of Germany, into Britain, which from that time bore the name Angel-land, subsequently England—that these Saxons and Angles and their language and character acquired an overwhelming influence in England, which remained even after the conquest and the admixture of the Normans. Accordingly, those words that denote objects of feeling and of every-day life are, for the most part, borrowed from the German language; on the other hand, words expressing abstract ideas and which refer to arts and sciences, are generally taken from Norman French, because the conquerors were more refined and civilized than the Saxons at the period of this amalgamation. However, it is evident from a perusal of Chaucer's poems, how much the German element predominated in the simple language of the English of those days, and how rich the stream is which sprang from this source and diffused itself over the minds of the English.

Since the Saxon and Roman languages form the chief elements of the English, and since the Latin is dead, it is to be regretted that this Latin branch of the

language, incapable of bearing any more fruit, should be preferred to the German branch which still flourishes in perfect health and vigour, the produce of which offers abundant means for supplying the wants of the language consequent on the uninterrupted formation of new ideas, flowing from the progress of science and the almost daily inventions in the arts. In this respect, therefore, is the study of German of decided importance as a means of enriching the English language. And it must be a subject of congratulation to every friend of the Saxon language, to observe the increasing estimation in which it is held by many of the most distinguished and popular English authors, who have rescued many expressive Saxon words from entire forgetfulness. In order that this observation may be fully understood, I have to remark, that the German language is capable of expressing the most minute variations of an idea with the utmost perspicuity.

Since it may then with propriety be said that the Germans and English can trace their origin to the same source, we find a greater analogy in feeling and sentiment between them, than between them and other nations, whose character and physiognomy prove them to be strangers to us in origin as they are in language. As a proof of the existence of this similarity of feeling and character prevailing amongst these nations, it may be mentioned that the works of the authors of any one of them are more popular and more highly appreciated by the other than in the rest of the world; thus in Germany a remarkable preference is given to the works of Shakespeare, Lord Byron, Sir Walter Scott, &c., and of the American authors Washington Irving, Longfellow,

Fenimore Cooper, &c.;—Shakespeare's works have been translated with such success by Schlegel, that in their German form they are but little inferior to the original. And, on the other hand, the approbation with which German works have been received in Great Britain and in the United States, proves this relationship of feeling notwithstanding that the operations of external circumstances have produced a variety in the development of the national character.

The enlightened classes in Great Britain, as in the civilized world in general, do ample justice to the character of the German nation, and agree in thinking, that its principal want is political union.

In Germany, for want of healthy and prosperous political life for some centuries, the most talented have devoted themselves to the advancement of science and art and for this reason we find the genius of the nation manifesting itself by a perpetual struggle with all those circumstances which are likely to fetter the mind; hence these zealous endeavours in the attainment of truth, whose course cannot easily be checked, and which already have overcome the greatest obstacles. It is hardly necessary for me to allude to Luther, the intrepid advocate of the pure doctrines of Christianity, of freedom of thought and of conscience, which are the fountains of religious and political freedom; to Copernicus and Kepler, the founders of modern astronomy, who have secured to men the dominion of the seas; to Gutenberg, to whose perseverance we are indebted for the most fruitful of all inventions, namely the art of printing; to Schwarz, whose invention of gunpowder

created an immediate revolution in the art of war; and what a long list of distinguished names recurs to my mind, as I wander through the history of science and contemplate those men, who, with an enlightened mind and indefatigable zeal, opened new roads to the temple of fame.

What an interesting picture is presented to our view by the flourishing state of arts and sciences in conjunction with purity of heart and mind in Germany and England, when we contrast it with the social depravity of Rome and Greece at the period when arts and sciences had attained their highest degree of perfection! Fortunately this affords the proof, that the assertion is incorrect, which maintains, that the progress of arts and sciences has a corrupting influence on morals. The fact that the cultivation of the mind and morality have been united in modern times, greatly enhances the value of civilization. If we investigate the causes that have produced these results, we shall find that, whilst the arts and sciences began to flourish at a period when the Greeks and Romans had already become inebriated by luxury and voluptuousness, the nations of Teutonic or German origin acquired a knowledge of the arts and sciences when their energies, both mental and physical, had been kept in a state of vigour and activity, partly by their strong love of nature and their consequent country-life, chase and navigation, as above mentioned, and partly by the wars of the middle ages. For the first time then in the history of the world we behold science placed within the mental grasp of people in the full possession of a pure mind and vigorous body; hence the rapid growth of arts and sciences, and the

innumerable inventions and discoveries of the present day. What has been said here is of course applicable to English men and Americans, and to all those countries colonized by the English and Germans in ancient and modern times.

The Germanic nations, whether we regard them in their own country or their descendants in England and America, an original and peculiar people in language and customs, living under a sky more stern, in countries abounding with forests and mountains, which are traversed by deep and rapid rivers, are inclined to compare themselves to an oak, a tree held in great veneration by them; it grows slowly, but vigorously, it strikes its roots deeply in its native soil stretching out its umbrageous arms, refreshed by the enlivening rays of the sun, and remaining firm and unmoved by the tempests of ages. This is a just symbol of that good-natured, intellectual and vigorous Germanic race.

To consider even superficially those mental treasures, which the Germans have raised from the dark recesses of science, would occupy much more space than that which is afforded me in a short article. I therefore designedly refrain from alluding to that which has been accomplished in the cause of science in Germany, and do so with less hesitation, as this has already been attempted by many of my countrymen. Permit me, on the other hand, to call the attention only to that which the modern poets of Germany have presented to the world.

The genius and character of a people manifest themselves most clearly and to the greatest advantage in the language of poetry. Were I now to give a full



history of poetical literature in Germany, it would be necessary to show the development of the national genius through all its periods; but such is not the intention of my present essay; my aim is only to give a few sketches of the character of modern poetical German literature. For this reason I do not now dwell on the ancient "Nibelungenlied," (the German Iliad,) and the "Gudrun," (the German Odyssey,) on the "Minnelied" of the Troubadours, on the poems and dramas of Hans Sachs, the celebrated master-singer and shoemaker of Nürenberg, nor on the poems of Gelert, Gleim, von Kleist and many others of more recent date. I begin with Lessing, because from this time we date the most flourishing period of German poetry. His contemporaries and successors, whom he had guided by his criticisms, gave fresh life to poesy, and successfully cultivated particularly the drama, to which the greatest German poets devoted themselves almost exclusively.

Other European literatures had flourished, before modern German poetry unfolded its flower. But other nations have also enjoyed the advantage of having had enlightened predecessors. The Italian, Spanish, English, French and German literature have followed each other in successive order. This phenomenon may be ascribed to the fact, that the splendid periods of a nation's literature exert a powerful influence on neighbouring nations.

Modern poetical literature in Germany is characterized by an harmonious union of nature, taste and cultivation, such as we find in the dramas of Goethe and Schiller, and also in the literary society of that coun-

try. Literature and society are, in Germany, intimately connected, because literature and science there enliven everything and fill the whole sphere of action. Germany has had no very prosperous public political life; it has, instead of it, literature and the fine arts. This has produced there that literary aristocracy which acknowledges in its sphere no rank but that of genius and of learning.

Let us turn to some of the best representatives of modern German poetry.

It is with a mingled feeling of admiration and gratitude, that I first mention Lessing, who united wit and erudition, penetration and taste, criticism and creative imagination, in a degree, which must fill every reader with astonishment and delight;—that man who, by his eminent critical writings, was the first to free his country from the chains of a pedantic imitation of the French and to point out to it an independent path. In his work, entitled “Dramaturgy,” he unfolded fully the errors of the French theories of dramatic composition, together with the defects of the French dramatic writers, and eulogized the best Spanish and English dramas, particularly those of Shakespeare. Of equal merit is his “Laocoon” on the limits of painting and poesy, in which he attacks the mannerism of poetical painting. He shows in this work that the supreme law of Grecian sculpture was ideal beauty of *form*; and that poesy, not considering, like the plastic arts, material bodies, but temporary emotions and events, ought to regard ideal beauty of *action* as its supreme law. He thus places in the foreground the Epos and the Drama, as bearing the nearest affinity to the plastic arts.

In his critical writings, he was the best pioneer of his time, or as he called himself, "The overseer in the picture gallery of German literature." He furnished, at the same time, excellent models in his dramas, "Miss Sarah Sampson," "Emilia Galotti;" and in his comedy, "Minna von Barnhelm." All are correct and full of truth and nature, though deficient in warmth of poetical inspiration. His genius produced, near the close of his life, the most beautiful flowers. In his late writings, "The Education of Mankind," and the didactic drama, "Nathan the Wise," he unfolded a depth and clearness of thought which few of his contemporaries rightly valued, but for which he is now universally admired, as well as for the power and moral influence of all his works.

Widely different from him in style, and yet similar in patriotic sentiment, was Klopstock, the author of those poems which cast such lustre on the German name, and of that exalted epic, "The Messiah," glorifying our Saviour. The sublimity of thought embodied in this poem renders it in this respect not inferior to even the poems of Milton. Klopstock commenced this epic in 1746, while yet a student at Jena and Leipzig, and concluded it in the year 1772, with the twentieth canto. In order to enable him to finish it, the King of Denmark gave him a pension for life. The slowness of composition was unfavourable to the poem, as his first cantos, written under the influence of youthful enthusiasm, are the best. His poetical talent is more of a lyric than an epic character. The lyric and elegiac parts of the work are, therefore, those which appeal most to the feelings of the reader. His lyric muse, replete with genius and

deep feeling, is devoted in his odes and elegies to religious and patriotic subjects.

At the close of the last century the court of the Grand-duke of Weimar embraced Wieland, Herder, Schiller and Goethe, minds which would have conferred the highest renown on any nation.

Among the numerous productions of Wieland, I will only mention those pleasing romances, *Oberon*, *Gandalin*, *Geron*, *Schach Lolo*. In the *Abderites*, he exhibits the contrast between chivalrous romance and the spiritless life of matter-of-fact people. The works of Wieland and Klopstock present the most vivid contrast, which is also discoverable in the productions of their imitators. Thus, for instance, Wieland sings of earthly attachments, Klopstock of spiritual love; from the mixture of both arose that languishing sentimentality predominating in Goethe's *Werther*. A sort of levity pervades some of Wieland's productions, but his language is easy, pleasing and graceful. His love for antiquity induced him to translate several congenial classic authors; their merits rest more in an able transformation, than in a correct version of the originals. In this species of writing, Wieland is greatly surpassed by Voss. He translated the letters and satires of Horace, Lucian's works, the plays of Aristophanes, and the letters of Cicero.

Herder in his writings, when young, pursued the course of Lessing in his criticism, but gave freer play to his imagination and thus obtained an animating influence over young authors. He especially exerted a favourable influence on Goethe's youth, and contributed

much in deciding the bent of his genius. It may be remarked here in general, that the beneficial effects on literature, resulting from the warm friendships existing among cultivated Germans, are a beautiful feature of German life. In their poetry we constantly meet with friends encouraging and guiding each other, and, free from envy, enjoying their mutual success. Such an intercourse we may behold between Herder, Klinger, Merck and Goethe; between Schiller and young Körner; in the circle of the poets at Halle, with Gleim in its centre, and Rammler, Kleist, Karsch, &c., &c., as its members, and in the poetic circle of Göttingen, the so-called "Hainbund," of which Boie, the counts Stollberg, Voss, Bürger, and Hölty, were the leading stars. Equally worthy of praise are the many instances of brothers uniting in literary pursuits, as, for instance, the renowned brothers, the Barons A. and W. von Humboldt, the Counts Stollberg, the brothers Grimm, Thibaut, &c., &c.

Herder possessed an extensive store of learning in every branch of literature, and his productions partake of this many-sided character. He was equally a critic, a poet, a philosopher and a theologian. His love of nature and primitive national customs was exhibited in all his productions. This he drew from the constant study of Homer, Ossian and Shakespeare, but chiefly from the Bible. One of his most beautiful poetic effusions is the *Cid*, that interesting romance from Spanish chivalry, in which every character is portrayed with the greatest precision. His sound sense and genius are equally seen in his didactic odes, legends and parables. In him were combined historical investigation, philo-

sophic combination and poetic conception. Hence his nice discrimination between right and wrong, and his skill in recognizing poetry, in whatever language it might appear, as the common language of human nature. Thus he loved Oriental, Greek and Roman poetry; he appreciated Ossian, as well as Shakespeare, the romances of the south as well as the German popular songs. His "Hebrew poetry," "Sadis," "Rosenthal," "Greek Epigrams," "Romances," "Stimmen der Völker in Liedern," are admirable specimens of his taste and style.

But what can I say of Goethe and Schiller, those heroes of our literature? It is with hesitation that I bring their merits in remembrance. Schiller and Goethe are renowned throughout the world, and their works are too numerous and too multifarious to admit of a separate enumeration and review, as my limits allow but a few general remarks. Goethe's and Schiller's views of life are almost as valuable as their poetry, and we treat them, both as philosophers and poets, as representatives of poesy as well as of life in general. Goethe's early drama, "Götz von Berlichingen," true to nature, shows in every scene that the author is complete master of any subject he treats. "Iphigenia" and "Tasso," his later dramas, expressing the poet's fervent and clear perceptions of antiquity, are fraught with touches of the finest taste and ideal beauty. His "Faust," in its first part the greatest effort of poetical diction and philosophical depth of thought, is his master-piece. Goethe's talents were divided between tragedy, comedy, and romance, and the productions of his imitators and successors exhibit an almost equal number of each.

Schiller's greatest productions are his dramas, among

which "Don Carlos," "Maria Stuart," "Wilhelm Tell," and "Wallenstein," are the best—the latter is his master-piece, and has been admirably translated by Coleridge. He appears equally great as a poet and a philosopher. By uniting taste and nature he reached the highest perfection in the dramatic art. The *form* of his dramas places them clearly between those of Shakespeare and Sophocles. Modern dramatists cannot, without the greatest danger, renounce the form given to the drama by Schiller.

But a criticism on the numerous productions of these authors is not my object; my aim being rather to depict the character of the two poets in a general view, in which I would compare the works of Schiller with Swiss scenery; those of Goethe with a variegated landscape.

Like the majestic Alps, raising their lofty pinnacles above the clouds, are the thoughts of Schiller; and pure as the eternal snow on these Alpine crests, is his morality; calm and lovely as Helvetia's valleys are his feelings, and clear as the lake which bears the image of the sublime scenery around, and of the azure sky above, is the character of man reflected in Schiller's mind.

Schiller's works are to be found in every German family; he is the poet of the nation and the idol of youth.

Goethe's works, on the other hand, represent his versatile genius, and expand themselves before us like a variegated landscape, abounding in meadows, fields and trees, adorned with blossoms, and laden with fruit; which is traversed by a road, enlivened by travellers of

all sorts and conditions, both great and small, high and low, good and bad, in silk and finery, and the working clothes of common life, philosophers and statesmen, warriors and peaceful citizens, gay courtiers and careworn artizans. Let us imagine this landscape to be bordered by the great ocean; its calm and tranquil surface reminds us, if far from home, of those peaceful scenes of domestic life, to which the poet occasionally introduces us; and does not that same ocean, when agitated by the tempest, present a picture of the misery and desolation created by passion and vice in those happy scenes to which we have alluded? The many treasures occasionally thrown up from the bosom of the ocean may afford us some idea of the value of those concealed beneath its waves, and thus it is with Goethe, who has displayed to us many of the pearls and gems drawn from the deep recesses of his mind.

With the dawn of German emancipation from the French yoke, Schiller's poetry ignited, penetrated and matured every plan of action. At that time Goethe was fading in the estimation of the young, and Schiller's spirit presided over the lyric of the day. His songs, as well as his ballads, have, by the aid of composers, become popular airs. Theodore Körner, the son of Schiller's most faithful friend, the renowned martyr and leader of those songsters, joining the lyre with the sword, produced poems and dramas closely approaching those of Schiller, and breathing the spirit of those animated times. Though Körner's life was short, he will forever live as the youthful poet in the grateful love of his country.

Jean Paul Richter, although contemporary of the be-



fore-named poets, stands alone in his original individuality. All the elements of German life of his time, the depth and sensitiveness of feeling, the severity of satire, the humour, the seriousness, the sparkling of juvenile fancy, the sober views of sound judgment, susceptibility and power of mind, poetry and knowledge, ideality and contentment, are concentrated in that one man as in a focus, and are reflected in his voluminous works. His writings show everywhere his warm feeling for innocence and purity of early youth; they breathe the enthusiasm of his friendship, love and virtue, and contain the most beautiful principles and reflections; and where he shows these feelings in contact with the rough touches of the world, he gives free play to his wit and humour, without bitterness. Jean Paul is in his writings perpetually youthful. As a humorist, he stands highest among the German authors. He unites all the elements of the highest culture of mind and feeling, and he is its truest representative. The most intimate acquaintance with the social and literary life in Germany is requisite in order to understand him. His style is bold and therefore not very clear; but the originality of his thoughts and feelings excuses his peculiarities of expression. His humorous novels, "Hesperus," "Titan," "Flegeljahre," "Katzenberger's Badereise," and others, are universally known; and also his scientific and literary works are of the highest value.

If we turn from the period in which the genius of a Goethe and a Schiller united to raise the poetical literature of the German people to its culminating point, towards that of their immediate or later successors, we meet with difficulty in forming a just appreciation

of the merits of the latter, from our judgment ever measuring their productions by the scale furnished by the effusions of the above-mentioned poets, and never reflecting on the possibility of much good emanating from less prominent talents. Indeed, whatever severe critics may say to the contrary, German literature has of late been enriched by productions that are far from lessening the hopes for her future glory. Passing at once from the period of Goethe and Schiller, to the writings of the *present time*, an account of which may be expected from me, we find the vast store of new productions in the field of belles-lettres so materially increased within the last few years, as to render their enumeration, in conjunction with a short sketch as to their critical value, a task of some difficulty. I shall accordingly omit many eminent names, and only review the *recent* works of *lyric*, *epic* and *dramatic* poesy, and arrange them in groups, as far as their nature permits.

Lyric poetry, like the vine, seems chiefly suited to the southern soil of Germany, especially to Swabia, the fatherland of Schiller. Uhland's delightful ballads on topics from the chivalrous ages, are generally known and admired; their innocence, gravity and depth of feeling corresponding perfectly with the German character. Contemporaneous and distinguished in the same species of poetry, are E. M. Arndt, M. Hartmann, Baron Sallet, Count Strachwitz, Charles Beck, Geibel, Stöber, Mörike, Prutz, Redwitz, Seidl, A. Meissner, Gruppe, Reinick, Wackernagel, Mosen, Sturm, Ruperti, Spitta, Novalis, G. Schwab and Kerner, the latter replete with gloomy thoughts and forebodings of death, Wilhelm Müller, the

writer of sweet and merry songs, Adolphus Tellkamp, whose poems are valued for depth and originality—more it does not become me to say of a brother. Von Eichendorff, with an inexhaustible love for the verdant forest, (a true German trait,) and Adalbert von Chamisso, a Frenchman settled in Germany, distinguished for vigorous language and a fresh and independent spirit. Mrs. Robinson, wife of the professor in New York, also is distinguished for her elegant productions, among which are here to be noticed her beautiful poems, entitled “*Serbische Lieder*,” published in Germany under the assumed name of Talvj.

One of the most distinguished modern poets among those *who did not confine themselves to German subjects*, is Rückert, the bard of the East, vieing with Hafiz in writing the most beautiful German verses after the Persian and Arabian manner. A master of that species of poetry, he has but one competitor, Count Platen, who strove with equal skill to imitate the Greek and Roman poets, but too early found a grave on the classic soil of Sicily. His poems are as smooth as the polished marble, and as graceful as the ancient statue. In strong contrast with Platen is Freiligrath, the poetic painter of the sea and desert, who, amid the rich lustre of his colouring, and southern warmth of scenery, never ventures to portray the wonders of antiquity.

The latest style of lyric poetry in Germany is opposed to this spirit, since it attaches itself exclusively to the German soil, and desires to express popular ideas. It might be called the political lyric, and has the disadvantage of treating on a subject which cannot be deemed poetical, namely, politics. The first strains

of this sort came from Heinrich Heine and from an Austrian, Count Auersperg, who, under the name of Anastasius Grün, published humorous scenes overflowing with rage against worldly and spiritual tyranny. He soon found an associate in Von Strehlenau, (Nicolaus Lenau,) also an Austrian. His poems were succeeded by those of Hoffmann von Fallersleben, Dingelstedt, Freiligrath and Prutz, all of a similar tendency, written partly in a satirical and partly in a grave tone; Georg Herwegh, Kinkel and Harro Harring, with a revolutionary spirit, followed in their wake.

When we consider the numerous effusions of lyric poetry in Germany, the scarcity of *epic* productions appears surprising; in the Epos, Ladislaus Pyrker, Gottschall's "Carlo Zeno," and Adolph Tellkamp's "Irmgard," and in the Idyl, Eberhard, are worthy of notice. Let us not, however, limit the idea of epic poetry to the strict form of verse, but embrace in it every characteristic exhibition of epic matter, thus extending it to romance and novel. The latter presents a field for a rich harvest—so rich indeed, as to render their critical examination within our present limits a difficult task. Yet I will attempt it, taking the liberty of distinguishing the chief tendencies of German novels in the early part of this century, as the *classic*, *romantic*, and *imaginative-humorous*. Goethe, formed after the models of antiquity, marks the first, by making us, in the absorbing interest of his matter, lose sight of the author. The second emanated from Tieck, and the third from Jean Paul Richter. The manner of these three may be clearly traced in the later progress of literature, although we cannot deny that there is more or less coincidence in

several of their productions. Goethe's social novels, "Wilhelm Meister," and the "Wahlverwandtschaften," in which he exhibits, with psychological depth, the state of society, chiefly in the higher circles,—are succeeded by Immermann's "Epigonen," and partly by his more original "Münchhausen;" the same style is followed by Von Sternberg, in a series of novels and romances, wherein he depicts, with simplicity and elegance, portraits and conflicts of European aristocratic society. Of the same nature are the novels of the Countess Hahn-Hahn, who delights in sketches of artless nature, as well as of high life, reflected in her high and unrestrained genius. Laube is less successful in his wanderings through the higher circles, since he depicts imaginary characters. Yet we must allow him the merit of being an agreeable describer of passing events. With deeper feeling, Dingelstedt, and with brilliant wit, Detmold, in Hannover, pursue the same line, in tragic and humorous pictures of the conflicts of life.

The poetry of the romantic school moves in an entirely different orbit. I have named Tieck as the leader of this school, though he, too, in a series of novels, joined the above-mentioned species of writing. In a similar manner as Sir Walter Scott, who, in translating the Eleanor of Bürger, first found that he himself was a poet, thus roused by the poetic spirit of Sir Walter Scott's historical novels, Tieck composed his "Revolt in the Cevennes" an exquisite, though an incomplete work. This historical painting is a fine specimen of the art, evincing both romantic poesy and psychological depth. He depicts public life with a continual reference to domestic circumstances; at one time presenting them

at variance, and at another in harmony. His historical novels, "The Poet's Life," and "The Poet's Death," are replete with beauties. The King of Prussia had given him a situation in Berlin, where he could, at his leisure, devote himself to his muse. He has had a series of able imitators. As favourite novelists of this school, I must mention Spindler and Blumenhagen, both gifted with imagination, but often overstepping the bounds of beauty, and sinking into caricature. Heinrich Zschokke is of surpassing value as a novelist, and theological and historical writer. The clearness and simplicity of his diction, and the noble sentiments expressed, render him one of the most popular writers.

A truly poetic spirit is evinced by H. Steffens, in his "Norwegians," by Wm. Alexis (Häring), in his "Cabaus," "Roland of Berlin," and "Pseudo Waldemar," subjects taken from the Prussian history, and treated with much truth and nature. Heinrich König also belongs to this class; in his "Waldenses," his renowned "Bride," and his "Willis Dichten und Trachten," he makes Europe, the south in the two former and the north in the latter, the scene of highly poetic events. The much-read "Godwie Castle," "St. Roche," &c., &c., are the late productions of Madame von Paalzow, a highly-gifted lady, who traversed England, France and Germany, in search of subjects for historical novels. With greater fidelity to history, Theodor Mügge depicts the conflicts in the Vendée, and at Hayti, (in his "Vendeeerin" and "Toussaint,") and Theodor Mundt the war of the German peasants in his "Thomas Münzer." The former is distinguished by rare talents and vivid colouring, the latter, by wise reflections. In considering fan-

tastic novels, in which wit is joined with humour, I would place on the foreground those of Leopold Schefer, similar to Jean Paul's original productions. The former bears the reader far from the German soil and the narrow sphere of domestic life in which Jean Paul delights to linger.

Gutzkow's "Blasedow," as a comic novel, is an imitation of Jean Paul's comic vein. Immermann's "Münchhausen," too, comes partly under this head. For unvarnished descriptions of humble life and nature, perhaps, also, Auerbach's "Dorfgeschichten," for the description of life in the middle classes Freitag's "Soll and Haben," and Eichendorff's charming novels should be mentioned here, though the latter like Fouqué's "Undine," or Charles Mackay's "Salamandrine" contain more the purely romantic element of *legends*, a species of poetry once presenting so brilliant an appearance in Tieck's "Phantasmus," but since led astray by Hoffmann's strange creations, and at present but little cultivated.

Proceeding, finally, from the epic poetry to the *comedy*, we are forcibly struck by the gloomy perception of the art retrograding from the elevation it had attained by the exertions of Lessing and Goethe; and, in the present situation of German public life, there is small ground to hope for its improvement. Comedy, to flourish, must not be confined only to the representation of common life, but have a certain freedom to treat of public persons and events. The Princess Amalia of Saxony has made successful attempts in representing humble life in her popular comedies. Among the other writers of comedy are worthy of notice, Bauernfeld at Vienna, Raupach at Berlin and Gottschall

at Breslau, whose comedies "Pitt and Fox" and "Law" are excellent.

Tragedy has been cultivated with greater success and copiousness. Michael Beer (as did once Theodor Körner,) struggles to become a successful follower of Schiller; while Grabbe, and the talented Immermann, are both in their manner and choice of historical subjects, original writers. Under the influences of recent times have been furnished several successful dramas, which have been much applauded, as Gutzkow's "Richard Savage," Julius Mosen's "Otto III.," Prutz's "Charles of Bourbon," and Gottschall's drama "Mazeppa". A metrical translation of the tragedies of Euripides, and one not unworthy of the sublime originals, has been made by Franz Fritze at Berlin.

The lyric-idyllic taste of the nation has prepared the way for a favourable reception of a few dramas, written with this tendency by Friedrich Halm (von Bellinghausen). They make us, however, feel but too deeply the insufficiency of an elegant style, and the invention of some charming scenes, to supply the want of more eventful action.

What I deem of more importance than an allusion to so many eminent names, is the observation that German literature, and especially poetry, must not be viewed as standing isolated and independent, since the same national genius manifests itself in various fine arts, especially in music.

Goethe and Mozart resemble each other in reflecting the images and sentiments presented by the occurrences of life clearly as a mirror, but embellished and perfectly harmonized. Schiller and Karl Maria von



Weber combine the highly ideal, with an ardent desire for the attainment of perfection. The compositions of Beethoven and of Jean Paul Richter are similar to each other, in both exhibiting a lively and playful imagination, united with romantic depths of feeling which enable them to pierce to the inmost recesses of the heart.<sup>1</sup> All have strewn imperishable songs and melodies over the path of life. Their songs resound in the cottage and the palace, filling the tranquil heart with delight, and weeping eyes with the brightness of cheerfulness and peace.

<sup>1</sup> How thoroughly appreciated and how greatly admired German literature and art are in Great Britain and the United States of America is shown especially by the writings of Carlyle and Emerson, both critical and biographical, and by the curious facts that the best life of Goethe is by the Englishman, Lewes, of Mozart by another Englishman, Edward Holmes, and that an American, A. W. Thayer, is now for the third time in Europe engaged in completing an extensive biography of Beethoven.



PRINTED BY FR. NIES (CARL B. LORCK), LEIPZIG.





---

PRINTED BY W. DRUGULIN, LEIPZIG.

---



